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 AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether class members have Article III standing to challenge the use of their race and gender to enable discrimination in the appointment of class counsel, premised on the assumption that race and gender are "pertinent to counsel's ability to fairly and adequately represent the interests of the class" under Federal Rule of Civil Procedure 23(g).

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Petitioner Nicolas Martin (Martin).[1] PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California to engage in litigation affecting the public interest. PLF has participated as amicus curiae in this Court in numerous cases involving discrimination on the basis of race, including *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013); *Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); and *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). PLF has also participated in this Court in cases involving class action certification, including *Sears, Roebuck & Co. v. Butler*, 133 S. Ct. 2768 (2013) (mem.); and *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

PLF considers this case to be of special significance in that the decision below threatens to prevent review of federal courts' race-conscious

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of PLF's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, PLF affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than PLF or its counsel made a monetary contribution to the preparation or submission of this brief.

decision making in the appointment of class counsel. PLF respectfully requests that this Court grant Martin's petition, and reverse the decision of the Court of Appeals in *Blessing v. Sirius XM Radio Inc.*, 507 Fed. App'x 1, 5 (2d Cir. 2012).

INTRODUCTION AND SUMMARY OF ARGUMENT

Individuals who are classified on the basis of race, or whose rights are affected by discrimination against a third party, have standing to challenge these impermissible uses of race. *See McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) (holding that the government's irrational classification by race is an injury to the persons classified); *Powers v. Ohio*, 499 U.S. 400, 410-11 (1991) (finding third-party standing for a criminal defendant to challenge discrimination against jurors). Here, the district court directed class counsel to assign attorneys to the case in proportion to the race and sex of the class members. *See Blessing v. Sirius XM Radio Inc.*, No. 09 CV 10035 HB, 2011 WL 1194707 (S.D.N.Y. Mar. 29, 2011). Because the court's order requires class counsel to classify class members by race, any member of the class should have standing to challenge the classification. Alternatively, any class member should also be able to challenge the discrimination against the attorneys under this Court's third-party standing doctrine.

After certifying counsel for this class action, the district court directed counsel to "ensure that the lawyers staffed on the case fairly reflect the class composition in terms of relevant race and gender metrics." *Blessing*, 2011 WL 1194707, at *12. To comply with this order, the firm appointed to represent Martin had to classify him and the other class

members by race and gender—otherwise it could not know the race and gender composition of the class. With this information, the firm was to discriminate amongst its lawyers when staffing this case. The order assumes that an attorney's—and the class members'—race and sex are pertinent to the attorney's ability to fairly and adequately represent the members of the class under Federal Rule of Civil Procedure 23(g).[2] The court did not explain how class counsel's competence is impacted by their race and the race of their clients. *Id*.

Martin objected to the discriminatory order, arguing that the race-based attorney selection violated his constitutional right to equal protection under the Due Process Clause of the Fifth Amendment. The court of appeals dismissed his objection, holding that he hadn't alleged a sufficient injury to have standing. *See Blessing*, 507 Fed. App'x at 5. According to the court of appeals, being classified by race and having important decisions affecting his legal rights made by a decision maker chosen, at least in part, on the basis of race were not enough to confer standing to Martin. *Id*. The court below would require Martin to suffer additional harms before invoking the courts' protections. *Id*.

The petition raises issues of constitutional importance. The decision below relied on rationales

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[2] Rule 23 of the Federal Rules of Civil Procedure governs class actions. Subsection "g" provides for the appointment of class counsel by the district court. Fed. R. Civ. P. 23(g). Pursuant to this rule, a court must consider four factors, each pertaining to the counsel's ability to carry out the representation, Fed. R. Civ. P. 23(g)(1)(A), 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)(B).

which this Court has expressly rejected, in other contexts, under both the Fifth Amendment's Due Process Clause and the Fourteenth Amendment's Equal Protection Clause. *See, e.g., McCleskey*, 481 U.S. at 292. Martin has petitioned this Court to decide whether the constitutional principles articulated in this Court's equal protection cases extend to the race-based selection of attorneys, or if this form of government classification and discrimination is uniquely shielded from scrutiny. Because the elimination of racial discrimination from the judiciary is an obligation of constitutional importance, this Court should grant the petition.

REASONS FOR GRANTING THE PETITION

I

THE PETITION RAISES IMPORTANT QUESTIONS CONCERNING ARTICLE III STANDING TO CHALLENGE RACE-BASED GOVERNMENTAL DECISION MAKING

Previous rulings from this Court have not required individuals classified on the basis of race to allege additional injury on top of the classification. *See, e.g.*, *McCleskey*, 481 U.S. at 292. Yet the decision below held that Martin must allege additional injury. *Blessing*, 507 Fed. App'x at 5. Martin should be able to challenge the denial of his equal protection rights because the court's order required him, and the other class members, to be classified by race. Further, the court subjected his rights to the decisions of attorneys impermissibly appointed due to their race. *Cf. McCleskey*, 481 U.S. at 291 n.8; *Peters v. Kiff*, 407

U.S. 493, 497-98 (1972). Additionally, Martin should have standing to challenge the district court's discriminatory order to vindicate a third party's equal protection rights. Past decisions of this Court have extended broad third party standing to parties to challenge discrimination against others in their judicial proceedings. *See Powers v. Ohio*, 499 U.S. at 410-11. Because of the importance of these issues, the petition should be granted.

A. The Petition Should Be Granted to Determine If an Individual Whom the Government Subjects to a Racial Classification Must Allege Additional Injury to Invoke the Protections of the Courts

Under equal protection law, being classified on the basis of race confers Article III standing. *Cf. McCleskey*, 481 U.S. at 291 n.8. In *McCleskey*, a black defendant challenged a state's racially disproportionate imposition of the death sentence when the victim of a crime was white. *Id*. at 291-92. The state of Georgia argued that he lacked standing because any discrimination was amongst the victims and not the defendant. *Id*. at 291 n.8. The Court rejected this argument, explaining that the defendant had standing to challenge this use of race because it called the neutrality of his prosecution into doubt. *Id*.

Similarly, the deprivation of the right to a jury chosen without regard to race is an injury sufficient to confer standing. *Batson v. Kentucky*, 476 U.S. 79, 86-87 (1986); *see generally* James J. Tomkovicz, *Twenty-Five Years of Batson: An Introduction to Equal Protection Regulation of Peremptory Jury Challenges*, 97 Iowa L. Rev. 1393 (2012). In *Batson*, a black

defendant challenged the exclusion of black petit jurors. 476 U.S. at 86-87. When a judicial process unjustifiably takes a litigant's race, and the race of a third party (the excluded juror), into account, it causes an injury to both. *Id*. at 87-88, 91-92. The defendant is injured because the deprivation of the constitutional right to have a jury constituting a fair cross section of the community is an Article III injury. *Taylor v. Louisiana*, 419 U.S. 522, 526 (1975).

In *Peters v. Kiff*, a criminal defendant was injured where the grand jury was improperly selected on the basis of race. 407 U.S. at 497-98. The defendant did not have to show that the discrimination affected the outcome of his case in order to establish standing. *Id*. The denial of the right not to have his rights determined by a discriminatory process is an Article III injury, which occurs "whether he is acquitted or convicted. In short . . . the existence of a constitutional violation does not depend on the circumstances of the person making the claim." *Id*. at 498. Requiring more "takes too narrow a view of the kinds of harm that flow from discrimination." *Id*.

The liberal standing requirement for equal protection injuries is not limited to jury selection. For example, a resident of a racially gerrymandered district has standing to challenge the creation of that district. *Shaw v. Hunt*, 517 U.S. 899, 904 (1996). The voter does not have to show that the racial gerrymandering caused additional injury—by affecting the outcome of an election or causing a law to be adopted that otherwise would not. *Id*. Similarly, the denial of the right to fairly compete for admission to public universities is an Article III injury. *Regents of University of California v. Bakke*, 438 U.S. at 280 n.14

(holding that an applicant is not required to show that he would have gained admission but for the discriminatory admissions process). A parent group in a district where student assignments were made on the basis of race, too, suffers an Article III injury, without having to show that their children would have been assigned to different schools but for the racial classification. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. at 718-19. Likewise public contractors suffer an Article III injury if they are denied a racially neutral opportunity to compete for contracts. *Adarand Constructors, Inc. v. Pena*, 515 U.S. at 210-11. Importantly, the plaintiff does not have to show that, but for the discrimination, it would have been awarded the contract. *Id*. at 211.

Martin's objection to the racial classification and discrimination that occurred here is distinguishable from a citizen's general interest in having the government act in accordance with the law. *Cf. Allen v. Wright*, 468 U.S. 737, 754 (1984) (explaining that a general interest in the government complying with the law does not confer Article III standing). To comply with the lower court's order, class members must be classified by race and gender to determine "the class composition in terms of relevant race and gender metrics." *See Blessing*, 2011 WL 1194707, at *12. Further, by requiring the class' attorneys—who will necessarily make important legal decisions on their behalf—to be selected on the basis of race, the court violated the class members' right to have counsel appointed solely on the basis of the counsel's ability to fairly and adequately represent the class. *See* Fed. R. Civ. P. 23(g). The Court should grant the petition to resolve whether, to seek redress in the courts, class members must suffer injury beyond being classified by

race and having decisions affecting their rights made by an attorney selected, in part, on the basis of race.

B. The Petition Should Be Granted to Determine Whether a Litigant Can Assert Third Party Standing If His Attorney Is Selected on the Basis of Race

Alternative to Martin's standing to challenge the classification, the Court should also grant the petition to determine whether a class member can assert third-party standing when his counsel is selected on the basis of race. Third-party standing enables a litigant to challenge violations of someone else's right to equal protection, where the directly affected party is unlikely to sue. *See Powers*, 499 U.S. at 410-11. This petition permits the Court to resolve the application of third-party standing to the selection of class counsel under Federal Rule of Civil Procedure 23(g).

Under the third party standing doctrine, a litigant can challenge racial discrimination against someone else in the litigant's proceeding. In *Powers*, a white criminal defendant asserted the rights of black jurors who were excluded from the jury because of their race. 499 U.S. at 410-11. *Powers* explained that a litigant may assert the rights of third parties if (1) he has a concrete interest in the resolution of the third party's rights, (2) he shares a close relation to the third party, and (3) there is a practical hindrance to the third party's ability to protect her own interests. *Id*.

A defendant has a concrete interest in the jurors' rights because of his interest in the integrity of his criminal proceeding. *Id*. at 411. He is not required to show that the dismissed jurors would have changed the

outcome of the proceedings. *Id*. Rather, a defendant is injured when he is deprived of his right to a trial by a jury chosen from a fair cross section of the community. *Id*.

Martin has suffered a similar injury. He, and the other class members, have a right to have class counsel appointed solely with regard to their ability to represent the class. *See* Fed. R. Civ. P. 23(g). By introducing race as a criterion, the district court's order deprived the class members of this right. Requiring Martin to show additional injury, as the court of appeals would, is improper. Because he was deprived of this right under Rule 23(g), Martin has a concrete interest in the third-party claim. *See Powers*, 499 U.S. at 411.

The second requirement to establish third-party standing is satisfied if the litigant's interests are aligned with the third party and he will, therefore, serve as an effective advocate. *Id*. at 414. In *Powers*, this requirement was satisfied because the criminal defendant had every incentive to fully defend the excluded juror's rights—if successful, the defendant's conviction would be overturned. *Id*. Similarly, class members have a close relation to the attorneys who suffered discrimination as a result of the Court's order. If a class member successfully demonstrates that the use of race to select the attorneys representing the class was illegal, he will prevent the settlement reached by those attorneys from binding himself and the rest of the class.[3] This gives the class members

[3] Martin's desire to have the settlement denied is apparent in this case, as he objected to the settlement on numerous grounds including on the discrimination issue raised here, the fairness of (continued...)

every incentive to vigorously protect the third-party's rights. *See id*.

The final inquiry to establish third-party standing is whether there are practical obstacles to the third party asserting her rights. *Id*. at 411. Even if the third party has a right to bring suit on her behalf, this element may be satisfied if such challenges are rare or face practical obstacles.[4] *Id*. As this Court recognized in *Powers*, when a person suffers discrimination in a judicial proceeding that doesn't directly affect his rights, he will probably leave the courtroom possessing little incentive to begin "the arduous process needed to vindicate his own rights." *Id*. at 415.

The attorneys who suffered discrimination as a result of the district court's order face greater obstacles than those in *Powers*. They too are excluded from the proceeding. Obtaining declaratory or injunctive relief would prove difficult because—like the individual prosecutor's use of peremptory challenges—the judge's diversity order is not a systematic practice which would enable the third party to show that the injury is likely to recur. *See id*. at 411. But most daunting are the economic disincentives for an attorney to challenge the discrimination. The district court required class counsel to racially discriminate amongst its own attorneys in staffing this matter. *See Blessing*, 2011

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[3] (...continued)
the settlement to class members, and the reasonableness of the fee award to class counsel. *See generally Blessing*, 507 Fed. App'x 1.

[4] The practical obstacles in *Powers* are illustrative. These include the third party's exclusion from the proceeding in which the discrimination takes place, the difficulty of obtaining effective relief, and the expense of bringing a suit. 499 U.S. at 414-15.

WL 1194707, at *12. The discrimination was not suffered by other firms or attorneys outside the firm appointed class counsel. It was suffered by attorneys at the appointed firm who were not given a fair opportunity to compete for this work because of their race. *Cf. Adarand Constructors, Inc.*, 515 U.S. at 210-11. In light of the substantial economic benefits bestowed on the firm by being appointed class counsel, only a foolhardy attorney would challenge the order, thereby prejudicing the business of her own firm. *Cf. In re Auction Houses Antitrust Litigation*, 197 F.R.D. 71, 75 (S.D.N.Y. 2000) ("Given the potential for massive plaintiffs' recoveries in [class actions], the lead counsel position may involve a potentially large attorney's fee. The role therefore has become a coveted prize to be fought over or bargained for among competing plaintiff's attorneys."); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 Nw. U. L. Rev. 469, 532-33 (1994) ("The monetary awards, the power, and the prestige associated with control of mass cases are enormous. Not surprisingly, jockeying among potential representatives becomes fierce[.]").

Although this Court has not considered the application of the third-party standing doctrine to discrimination in the counsel appointment process, its decisions applying the doctrine to jury selection demonstrate that it should extend to these circumstances. Allowing a lower court to require racial discrimination in the selection of attorneys could set an alarming precedent. Could a judge, using similar reasoning to that used here, decide that black attorneys must be appointed to represent black criminal defendants, white attorneys for white defendants, and Latino attorneys for Latino defendants? If the criminal defendant could only

challenge this discrimination if she can show that she received inadequate counsel, this racially separate appointment process would escape scrutiny unless the defendant could prove that it was not, in fact, equal. *But see Brown v. Board of Ed.*, 347 U.S. 483, 495 (1954) (overruling the "separate but equal" doctrine because separate is inherently unequal).

The Court should grant the petition to determine if a class member can assert the rights of attorneys who are injured when a court directs their employer to discriminate against them on the basis of race.

II

UNLESS THIS COURT RECOGNIZES STANDING TO CHALLENGE RACIAL CLASSIFICATIONS AND DISCRIMINATION IN THE APPOINTMENT OF ATTORNEYS, THIS RACIAL DISCRIMINATION WILL BE SHIELDED FROM SCRUTINY

Distinctions between persons based solely upon their race "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). Accordingly, all racial classifications by government are inherently suspect and presumptively invalid. *Adarand Constructors, Inc. v. Pena*, 515 U.S. at 234. They can only be upheld upon an extraordinary justification. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979). This Court's approach to classification and discrimination claims arising under the Fifth Amendment is identical to those under the Equal Protection Clause. *Adarand*,

515 U.S. at 217. Both clauses protect a personal right to equal protection that is violated by government actions based on racial classifications—which are almost always irrelevant and therefore prohibited. *See Grutter v. Bollinger*, 539 U.S. at 326. Accordingly a racial classification can only be upheld if it serves a compelling governmental interest and is narrowly tailored to further that interest. *Adarand*, 515 U.S. at 235.

A. This Court Has Never Found a Compelling Interest That Would Permit Federal Courts to Use the Appointment of Class Counsel Under FRCP 23(g) to Require Racial Discrimination

Since applying strict scrutiny to racial classifications, this Court has recognized only two interests sufficiently compelling to justify discrimination—remedying the effects of past intentional discrimination and achieving a "critical mass" of diverse students at highly selective law schools. *See Parents Involved*, 551 U.S. at 720-22 (citing *Freeman v. Pitts*, 503 U.S. 467, 494 (1992); *Grutter*, 539 U.S. at 328). A third potentially compelling interest—national security—was recognized in the now widely scorned *Korematsu v. United States* decision. 323 U.S. 214, 223 (1944) (allowing the internment of Japanese-Americans during World War II). But *Adarand* subsequently called this interest into doubt, explaining "[a]ny retreat from the most searching judicial inquiry can only increase the risk of another such error occurring in the future." 515 U.S. at 236. "The fact that such an important and vital interest, national security, was

retroactively determined to be insufficient to justify the use of racial classifications in the *Korematsu* situation demonstrates just how stringent judicial review under strict scrutiny was meant to be." Brandon M. Carey, Note, *Diversity in Higher Education: Diversity's Lack of a "Compelling" Nature, and How the Supreme Court Has Avoided Applying True Strict Scrutiny to Racial Classifications in College Admissions*, 30 Okla. City U. L. Rev. 329, 345 (2005).

The court below dismissed Martin's objection to the court's race-based attorney staffing requirement on standing grounds. *Blessing v. Sirius XM Radio Inc.*, 507 Fed. App'x at 5. Therefore, it didn't consider whether there is any compelling interest that would justify the discrimination. Neither of the compelling interests recognized by this Court are served by the discrimination that occurred here. The district court did not find that discrimination amongst the attorneys here would remedy any past intentional discrimination. *See Blessing*, 2011 WL 1194707, at *12. Nor did the order relate to the educational benefits of racial diversity. *See id.*; *see also Fisher v. University of Texas at Austin*, 133 S. Ct. at 2420.

New compelling interests are not to be recognized lightly. *See Adarand*, 515 U.S. at 236. Because of the importance of eliminating racial classifications and discrimination in the judicial process, this Court has interpreted due process to prohibit even the likelihood or appearance of bias. *Peters*, 407 U.S. at 502. The integrity of the judicial process depends on the fair and just selection of the people making decisions affecting the rights of litigants. This is why discrimination in the selection of grand jury members is

unconstitutional. *Campbell v. Louisiana*, 523 U.S. 392, 398-400 (1998).

The same concerns are present here. The attorneys who represent a class have a great deal of autonomy in making decisions affecting the interests of class members. *Cf.* Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 Nw. U. L. Rev. at 532-33. This power means that the appointment of class counsel raises more significant concerns than the selection of class representatives, which this Court has previously held implicates the Due Process rights of the other members of the class. *See Hansberry v. Lee*, 311 U.S. 32, 43-45 (1940). These concerns counsel against recognizing a new compelling interest that would permit this discrimination.

B. The District Court's Discrimination Order Required Racial Balancing

Assuming *arguendo* that the order here was intended to achieve some benefits associated with having diverse counsel[5]—and that this would be a sufficiently compelling interest—the order would still be unconstitutional because it compels racial balancing. Racial balancing—racially classifying individuals to achieve racial proportionality, rather than to achieve some benefit that flows from racial

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[5] After Judge Baer began to impose this diversity requirement in class actions, he reportedly explained that his decision was motivated by a desire to promote diversity in the legal profession. *See* Nate Raymond, *Judge's Unusual Order Revives Law Firm Diversity Issue*, N.Y.L.J., Oct. 28, 2010, *available at* http://www.law.com/jsp/article.jsp?id=1202474038196&slreturn=20130703154309; *see generally* Michael H. Hurwitz, *Judge Harold Baer's Quixotic Crusade for Class Counsel Diversity*, 17 Cardozo J.L. & Gender 321 (2011).

diversity—is patently unconstitutional. *See Grutter v. Bollinger*, 539 U.S. at 329-30; *Parents Involved*, 551 U.S. at 729-30 (explaining racial balancing). In its affirmative action cases, this Court has consistently distinguished the use of race to achieve educational benefits, through a "critical mass" of racially diverse students, from racial balancing. *See Grutter*, 539 U.S. at 329-30.

The district court did not direct class counsel to staff this matter with a critical mass of diverse attorneys to ensure the most effective representation. The judge's order required the lawyers to approximate the racial and gender composition of the class members. *See Blessing*, 2011 WL 1194707, at *12. According to the district court's reasoning, class counsel should be diverse *if* the class is diverse, and the appropriate level of diversity is determined by the makeup of the class. *See id*. This is racial balancing. The order, therefore, violates the equal protection guaranty. *See Parents Involved*, 551 U.S. at 729-30.

CONCLUSION

This Court has rejected the pernicious idea that two people of the same race are similar in other ways. *Batson* held that black jurors could not be excluded from a criminal case against a black defendant on the assumption that race was relevant to a juror's ability to be impartial. 476 U.S. at 85. *Powers* explained that race is also irrelevant to determining a person's competence. *See* 499 U.S. at 409-10.

The same impermissible assumption underlies the order challenged here. When appointing class counsel, a judge is permitted to consider any matter pertinent to counsel's ability to fairly and adequately represent

the interests of the class. Fed. R. Civ. P. 23(g). The district court assumed, without any justification, that an attorney's and client's race are pertinent to the attorney's competency to carry out the representation. If the petition is not granted, this impermissible use of an individual's race will escape review because no person, other than the client whose proceeding is affected by the discriminatory process, has any practical incentive to challenge it. This Court should grant Martin's petition to resolve whether its equal protection precedents extend to these circumstances.

DATED: September, 2013.

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