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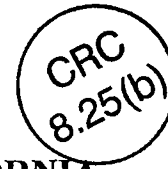

IN THE SUPREME COURT OF CALIFORNIA

DELANO FARMS COMPANY, FOUR STAR FRUIT, INC., GERAWAN FARMING, INC., BIDART BROS., AND BLANC VINEYARDS
Plaintiffs and Petitioners,

v.

CALIFORNIA TABLE GRAPE COMMISSION
Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL, FIFTH DISTRICT

Case No. F067956

PETITION FOR REVIEW

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STATEMENT OF ISSUES PRESENTED

1. Whether, consistent with free speech principles under Article I of the California Constitution, state-empowered industry boards may compel unwilling parties to contribute to their commercial advertising without serious constitutional scrutiny, even if they are not themselves subject to actual supervision and control by democratically accountable officials.

2. Whether state courts should adhere to precedent of the California Supreme Court, rather than defer to lower federal courts on questions of state constitutional law.

WHY REVIEW SHOULD BE GRANTED

This is the latest round in a legal struggle between independent farmers and a government-empowered industry board over who will control commercial speech about their products. The case provides this Court the opportunity to determine whether the state courts of California—and ultimately, this Court—will decide the meaning of Article I, Section 2, the free speech provision of the Constitution of the State of California, or whether the state courts will merely defer to the lower federal courts about the content of free speech principles and the nature of state programs.

In *Gerawan I*, this Court expressly declined to follow a then-recent holding of the United States Supreme Court permitting government-

compelled collectivization of commercial speech about agricultural products, (*see Glickman v. Wileman Bros. & Elliott* (1997) 521 U.S. 457), recognizing that the state constitution is not a mere simulacrum of the federal. (*Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468 (*Gerawan I*).) *Gerawan I* observed that as the ultimate interpreter of the California Constitution, this Court has authority to provide an independent—and more protective—interpretation of this State's fundamental law. (*Id.* at 485.) Sometimes, maybe often, analogous provisions of state and federal constitutional law will mean the same thing, and the interpretations of the federal Constitution by the United States Supreme Court are always entitled to respectful consideration. (*People v. Teresinski* (1982) 30 Cal.3d 822, 835.) But in the final analysis, cases governed by the California Constitution require California interpretation. (*See generally* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, (1976) 90 Harv. L. Rev. 489.)

Subsequently, in *Gerawan II*, this Court held that industry boards exercising state-delegated powers are insulated from Article I review under the government speech doctrine only if in actual practice their decisions are supervised and controlled by a democratically accountable official, such as the Secretary of the California Department of Food and Agriculture. (*Gerawan Farming, Inc. v. Kawamura* (2004) 33 Cal.4th 1 (*Gerawan II*).) Importantly, after *Gerawan II*, the United States Supreme Court reached the

same conclusion in *Johanns v. Livestock Marketing Assn.* (2005) 544 U.S. 550. In that case, the Court held that the compelled commercial speech program at issue was government speech insulated from First Amendment scrutiny because—and only because—the relevant decisions of the industry board were closely scrutinized and controlled by the Secretary of Agriculture. This condition for claiming the protections of government speech makes sense; as this Court observed in *Gerawan I*, absent true government oversight, marketing order programs are "not so much a mechanism of regulation of the producers and handlers of an agricultural commodity by a governmental agency, as a mechanism of self-regulation by the producers and handlers themselves." (*Gerawan I*, 24 Cal.4th at 503 n.8.)

In this case, it is undisputed that the relevant decisions of the California Table Grape Commission are *not* supervised or controlled by any democratically accountable official. Rather, the industry representatives who dominate the Commission are free to advance their own private interests, without state scrutiny and certainly without public control. Nonetheless, believing that it had an obligation to defer to the judgment of the Ninth Circuit in a federal case involving the same program, the court below essentially ignored *Gerawan II* and adopted the Ninth Circuit's misconstruction of *Johanns*—holding, contrary to both *Gerawan II* and *Johanns*, that the Table Grape Commission is exempt from constitutional

scrutiny despite an undisputed lack of democratic accountability. (*See Delano Farms Co. v. California Table Grape Com.* (2015) 235 Cal.App.4th 967, 185 Cal.Rptr.3d 771, 780 (deferring to *Delano Farms Co. v. California Table Grape Com.* (9th Cir. 2009) 586 F.3d 1219).)

Petitioners urge this Court to review the decision below, return to the principle of *Gerawan I*, and reaffirm that Article I of the California Constitution must be enforced in accordance with this Court's independent reading and not that of the inferior federal court that happens to have jurisdiction in this State.

Petitioners also urge this Court to return to the principle of *Gerawan II*, and reaffirm that when the legislature delegates coercive power to an industry group over what ordinarily would be private commercial speech, it can escape serious constitutional scrutiny under the government speech doctrine only if the industry group is subject, in fact and not merely on paper, to democratic oversight and control. The court below held otherwise. This case warrants review.

STATEMENT OF THE CASE

A. Petitioners and the Table Grape Commission

Petitioners Delano Farms Company, Blanc Vineyards, LLC, Gerawan Farming, Inc., Four Star Fruit, Inc., and Bidart Brothers, are independent grape farmers doing business in California. All are family businesses, and some have been operating in the state for decades. All of

the petitioners grow, market, and ship their own grapes, and most do not provide those services to other growers. (13 Clerk's Transcript ("CT") 3106:25-26; 1 CT 158:12-14; 1 CT 195:2-6; 1 CT 246:6-7.) Delano Farms, for example, grows table grapes on 6,000 acres in Kern County, California and does not handle grapes from any other producer, shipping only the grapes it grows and harvests itself. (13 CT 3106:24.) Currently, Delano Farms ships more than six million boxes of table grapes every year, throughout the United States and in the export market. (13 CT 3107:1-2.) As independent producers and marketers, Delano and the other petitioners expend time, energy, and money to distinguish their fruit from that of other table grape growers and shippers in the industry. (13 CT 3107:1-6; 1 CT 159:7-14; 1 CT 195:6-16; 1 CT 246:9-13.) From their point of view, table grapes are not a commodity; they are products reflecting the land, care, and skill of their growers.[1]

As grape growers in California, petitioners' businesses have been affected by the activities of the Table Grape Commission ("the Commission") created under the Ketchum Act of 1967. (*See* Cal. Food & Agric. Code § 65550, *et seq.*) The Ketchum Act formed the Commission to aid table grape growers through advertising, education, marketing, research,

[1] This case was decided on summary judgment below, so all facts must be construed by the appellate court in the light more favorable to petitioners. (*Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1601; *Essex Ins. Co. v. Heck* (2010) 186 Cal.App.4th 1513, 1522.)

and government-relations efforts, and empowered the Commission to impose assessments on grape growers to fund its pursuit of these goals. (*Delano Farms Co. v. California Table Grape Comm'n* (2015) 185 Cal.Rptr.3d 771, 773.) The Commission is composed of eighteen of petitioners' competitors—three from each of the state's six active grape-growing districts—and one "public member." (*Ibid.*) The Secretary of the California Department of Food and Agriculture (CDFA) appoints the members of the Commission from a series of nominees chosen by the table grape producers of each district, and retains the power to remove them. (*See* Cal. Food & Agric. Code §§ 65550, 65556, 65563, 65575.1.)

Under the Ketchum Act, all table grape growers are required to pay assessments, which the Commission uses to fund:

> The [Commission's] promotion of the sale of fresh grapes for human consumption by means of advertising, dissemination of information on the manner and means of production, and the care and effort required in the production of such grapes, the methods and care required in preparing and transporting such grapes to market, and the handling of the same in consuming market ....

(§ 65500(f).) In effect, the Commission requires all table grape producers to devote a portion of the resources available to product advertising to collective promotion of grapes as an undifferentiated commodity. Some growers benefit and others lose from this approach, depending on whether they wish to differentiate their products from those of their competitors. (13 CT 3112:3-20.)

The Commission is authorized, within a statutory cap, to set the rate of the assessments, as well as to sue producers for payment, civil penalties, or injunctive relief in the event of nonpayment of any assessment. (*See* Cal. Food & Agric. Code §§ 65572(*l*), 65650.) Over the past several years, the Commission has imposed an assessment on petitioners of about 13¢ per box of table grapes, which (depending on the petitioner) has amounted to tens of thousands or hundreds of thousands of dollars a year in assessments, and, in some cases, millions of dollars aggregated over the entire term of the assessment regime. Delano Farms, for example, has been paying $600,000 in assessments each year beginning with the 2000-2001 crop season. (13 CT 3108:5-9.) Any advertising or promotion of its own product is on top of this—and to the extent that Delano's business strategy is to differentiate its product from that of its generic competitors, the Commission's generic message conflicts with Delano's own message. (13 CT 3112:3-20.) The expenditure of these funds for promotional campaigns or "any other similar activities which the commission may determine appropriate for the maintenance and expansion of present markets and the creation of new and larger markets for fresh grapes," is left to "the discretion of the commission." (Cal. Food & Agric. Code § 65572(i).)

The Commission has discretion over the content of promotional campaigns and is not required to seek the approval of the Secretary of CDFA before running its assessment-funded advertisements. (§ 65572(h-

k).) There is no statutory requirement that the Secretary of CDFA or his designee attend Commission meetings, and it is undisputed that in practice the Secretary of CDFA does not oversee the content of the Commission's advertisements, and has exercised virtually no supervision of the Commission's activities more generally. (*See Delano Farms*, 586 F.3d at 1229-30 (acknowledging that "the Secretary and the CDFA have, in practice, performed virtually no supervision of the Commission").)

The Secretary of CDFA cedes control to the Commission in other ways. For one, the statute grants the Commission the authority "[t]o adopt and from time to time alter, rescind, modify and amend all proper and necessary rules, regulations and orders for the exercise of its powers and the performance of its duties, including rules for regulation of appeals from any rule, regulation or order of the commission." (Cal. Food & Agric. Code § 65572(b).) Other activities left "in the discretion of the commission" include the authority to determine the upcoming year's assessment (§65572(*l*)), to allocate assessment funds for scientific research and study (§65572(k)), and "to enter into any and all contracts and agreements, and to create such liabilities and borrow such funds in advance of receipt of assessments as may be necessary." (§65572(e).) The Commission is a corporate entity that "shall have the power to sue and be sued, to contract and be contracted with, and to have and possess all of the powers of a corporation." (§65551.) Tellingly, the statute proclaims that "[t]he State of

California shall not be liable for the acts of the commission or its contracts." (§ 65571.)

B. The Proceedings Below

Petitioners filed six complaints that were later consolidated in the Superior Court of California, County of Fresno, Central Division. Petitioners alleged, in part, that the "statutes authorizing the existence of the Commission, and the assessments imposed in accordance with the same," violated their rights under the free speech and free association clauses of Article I, Sections 2 and 3 of the California Constitution. (*See, e.g.*, 13 CT 3129:1-2.) In short, petitioners asserted that the assessments to fund the Commission's advertisements were an unconstitutional compelled subsidy of speech. Petitioners alleged that the assessments forced them to spend money in support of a message they did not agree with and that damaged their business, which depends on developing and marketing table grapes of higher quality than those of their competitors. (13 CT 3112:3-20.) The Commission's advertisements harm petitioners' ability to promote and distinguish their own high-quality products by marketing all California table grapes collectively and thus, generically. *See United States v. United Foods* (2001) 533 U.S. 405 (holding unconstitutional a federal statute that required mushroom handlers to fund a generic message inconsistent with their emphasis on the importance of the differences among branded products).)

On May 22, 2013, the Superior Court granted the California Table Grape Commission's motion for summary judgment. The California Court of Appeal, Fifth District, affirmed. The court deferred to the United States Court of Appeals for the Ninth Circuit's decision in *Delano Farms Co. v. California Table Grape Com.* (9th Cir. 2009) 586 F.3d 1219, which held that the same subsidies were immune from constitutional review under the First Amendment of the U.S. Constitution. Adopting the reasoning of the Ninth Circuit, the Court of Appeal concluded that the "Commission's activities could be classified as government speech" under *Johanns v. Livestock Marketing Assn.* (2005) 544 U.S. 550, in one of two ways: "if the Commission is itself a government entity or if the Commission's message is effectively controlled by the state." (*Delano Farms*, 185 Cal.Rptr.3d at 778.) The Fifth District Court of Appeal held that the Commission's promotional campaigns were government speech because the government effectively controlled the Commission's speech. (*Id.* at 780.) It therefore did not reach the question whether the Commission is a government entity. (*Ibid.*)

LEGAL DISCUSSION

THIS COURT SHOULD REVIEW THE COURT OF APPEAL'S HOLDING THAT THE TABLE GRAPE COMMISSION'S ADVERTISING IS GOVERNMENT SPEECH EXEMPT FROM CONSTITUTIONAL REVIEW

There are obvious tensions, warranting this Court's review, between this Court's decisions in *Gerawan I* and *II* and the Fifth District Court of

Appeal's deference to the Court of Appeals for the Ninth Circuit on a question of state constitutional interpretation. There are also obvious tensions between the Ninth Circuit's interpretation of *Johanns v. Livestock Marketing Assn.* (2005) 544 U.S. 550, embraced by the Fifth District Court of Appeals below, and both *Gerawan II* and *Johanns* itself.

In *Gerawan II*, this Court held that a government-empowered industry body—like the Table Grape Commission—cannot claim the talisman of government speech absent genuine control by politically accountable government officials over the promotional message. (*Gerawan II*, 33 Cal.4th at 26-28.) Here, it is undisputed that the Secretary of CDFA has performed virtually no supervision of the Table Grape Commission in general, and exercised no oversight over its promotional campaigns in particular. Instead of following this Court's guidance in *Gerawan II*, the Court of Appeal instead deferred to the Ninth Circuit's determination of a parallel question under the First Amendment and thus abdicated the state court's responsibility to interpret questions of state constitutional law independently of federal interpretations of federal law.

In deferring to the Ninth Circuit's analysis, the court below adopted an interpretation of Article I that contradicts *both* this Court's holding in *Gerawan II* and the U.S. Supreme Court's decision in *Johanns*. *Gerawan II* and *Johanns* both hold that government-empowered industry boards may compel unwilling parties to contribute to their commercial speech only if

democratically accountable government officials "*in fact* ... decide[]" the message of the commodity advertising at issue, (*Gerawan II*, 33 Cal.4th at 28), and control it "from beginning to end," (*Johanns*, 544 U.S. at 560). It is undisputed in this case, and the court below explicitly recognized, (*Delano Farms*, 185 Cal.Rptr. at 779), that the Table Grape Commission is effectively autonomous and thus presents the opposite case from that of the Beef Board in *Johanns*. Absent actual democratic accountability and control, the Commission's assessments challenged here are a forced subsidy of private—not government—speech. In sum, although the Table Grape Commission exercises coercive power delegated by the state, it is not a state agency, it is not under democratic control, and its speech is not that of the California government.

The Court need not reach the ultimate merits of this case at this juncture, but we submit that if the appellate court's holding about government speech is reversed and proper free speech scrutiny is applied, this program cannot possibly survive constitutional review. (*See Gerawan II*, 33 Cal.4th at 20-25 (remanding for compelled subsidy to be reviewed under intermediate judicial scrutiny); *United Foods*, 533 U.S. at 411 (holding that mushroom handers could not be forced to fund a message "that mushrooms are worth consuming whether or not they are branded").)

A. The Court of Appeal Disregarded this Court's Precedent

The Court of Appeal's holding that the subsidies at issue are exempt from constitutional review because they fund government speech is inconsistent with this Court's precedent. The California Supreme Court has held that a program that compels the funding of commodity advertising implicates the right to free speech under the California Constitution. (*Gerawan I*, 24 Cal.4th 468.) This Court recognized in *Gerawan I* that the right to free speech "is put at risk both by prohibiting a speaker from saying what he otherwise would say and also by compelling him to say what he otherwise would not say," and that this risk extends to the compelled *subsidy of a message* a speaker disagrees with. (*Gerawan I*, 24 Cal.4th at 484; *see also Keller v. State Bar of California* (1990) 496 U.S. 1; *United Foods*, 533 U.S. 405.) In setting forth these principles, the California Supreme Court emphasized that the State Constitution is even more protective of free speech than the U.S. Constitution: "article I's free speech clause and its right to freedom of speech are not only as broad and as great as the First Amendment's, they are even 'broader' and 'greater.'" (*Gerawan I*, 24 Cal.4th at 486.)

In *Gerawan II*, this Court specified the standard for assessing the constitutionality of a compelled subsidy of speech. (*Gerawan II*, 24 Cal.4th. 1.) The *Gerawan* cases involved plum growers seeking to differentiate their products, who challenged a marketing order requiring

them to finance generic advertising of plums crafted by an industry board dominated by their competitors. (*Ibid.*) Expressly parting ways with the Supreme Court's First Amendment decision in *Glickman v. Wileman Bros. & Elliott* (1997) 521 U.S. 457, *Gerawan I* held that the plum marketing order was subject to review under the free speech clause of the state constitution. (*Gerawan I*, 24 Cal.4th at 475-76.) Between *Gerawan I* and *II*, the U.S. Supreme Court substantially cabined *Glickman*, holding that compelled generic advertising programs of this sort violate the First Amendment unless they are an integral part of a comprehensive regulatory scheme, in effect bringing federal law back into alignment with this Court's interpretation of California law. (*United Foods*, 533 U.S. 405.)[2] In *Gerawan II*, the Court clarified that the plum advertising program should be reviewed on remand under the intermediate scrutiny standard set forth in *Central Hudson Gas & Elec. v. Public Serv. Comm'n* (1980) 447 U.S. 557. (*Gerawan II*, 24 Cal.4th at 6.) But in an important caveat, the Court held that if the defendant could show that the subsidized speech was the government's own, then the compelled speech program would be exempt from constitutional review. (*Id.* at 17-18.) The Court further decided that

[2] Paul M. Schoenhard, *The End of Compelled Contributions for Subsidized Advertising?: United States v. United Foods, 533 U.S. 405 (2001)*, (2002) 25 Harv. J.L. & Pub. Pol'y 1185, 1186 (discussing the tension between *Glickman* and *United Foods* and noting that the latter "cabin[ed]" the holding of the former).

the defendant's government speech defense could not be "resolved on the pleadings" and "require[d] further factfinding" below. (*Id.* at 23.)

In remanding the case for further proceedings, the Court made clear that the Plum Board's status as a government-created entity led by plum producers and handlers appointed by the Secretary was not enough. (*Id.* at 28; *see also* Cal. Food & Agric. Code § 58841.) That determination was consistent with *Gerawan I*'s observation that marketing order programs are "not so much a mechanism of regulation of the producers and handlers of an agricultural commodity by a governmental agency, as a mechanism of self-regulation by the producers and handlers themselves." (*Gerawan I*, 24 Cal.4th at 503 n.8.) Therefore, the defendant was required to show that the Secretary not only had oversight over the Plum Board by statute, but that he also exercised control over the Plum Board's messaging in practice. (*Gerawan II*, 33 Cal.4th at 28.)

The court below relied upon this distinction between private and government speech to exempt the Table Grape Commission's compelled subsidies from constitutional review. But it ignored *Gerawan II*'s clear guidance about what, in the context of a commodity advertising program, qualifies as the government's own speech. By *Gerawan II*'s plain terms, the Table Grape Commission cannot demonstrate that its promotional campaigns constitute government speech because the Secretary of CDFA is

not required by statute to oversee and approve the Commission's promotional campaigns, and has also failed to do so in practice.

The *Gerawan II* Court first rejected the argument that the Plum Board's generic advertising was "government speech" by definition, on account of the Board's status as a legislative creation with government appointees. The Court relied primarily on the analysis in *Keller v. State Bar of California* (1990) 496 U.S. 1, which held that the State Bar of California's mandatory dues, used to finance political and ideological activities with which members disagreed, were a compelled subsidy of private speech that violated the First Amendment. *Keller* reasoned that the State Bar, even though formed by the State, "is a good deal different from most other entities that would be regarded in common parlance as 'government agencies.'" (*Gerawan II*, 33 Cal.4th at 27 (quoting *Keller*, 496 U.S. at 11).) The State Bar's funds came from dues imposed on members, "not from appropriations made to it by the legislature," its members comprised a particular professional community that had no choice but to pay the dues, and it was formed "not to participate in the general government of the State," but to oversee a specialized professional sphere. (*Keller*, 496 U.S. at 11-13.) For these reasons, *Keller* concluded that State Bar's board of governors were not typical "[g]overnment officials ... expected as part of the democratic process to represent and to espouse the views of a majority of their constituents." (*Id.* at 13.) *Gerawan II* held that

the same was true of the Plum Board, which was "comprised of and funded by plum producers," and "is in that respect similar to the State Bar." (*Gerawan II*, 33 Cal.4th at 28.)

The Court then turned to the Secretary's alternative argument that because "he must ultimately approve any generic advertising issued by the California Plum Marketing Board, which is itself organized pursuant to statute" the speech is "actually that of the State of California rather than of a private association." (*Id.* at 26.) The Court held that although the Secretary's statutory authority was not enough, "the speech may nonetheless be considered government speech *if in fact* the message *is decided upon by the Secretary or other government official pursuant to statutorily derived regulatory authority*." (*Id.* at 28 (emphasis added).) The answer would require further proceedings, the Court explained, because "there are *factual questions* that may be determinative of the outcome," including "whether the Secretary's approval of the marketing board's message is in fact pro forma," and "whether the marketing board is in de facto control of the generic advertising program, and whether the speech is attributed to the government." (*Ibid.* (emphasis added).)

It is clear on the facts here that the Table Grape Commission cannot satisfy *Gerawan II*'s standard for government speech. But in disregard of *Gerawan II*'s emphasis on both statutorily-required and actual government control—and instead relying on Ninth Circuit precedent under the federal

constitution—the court below held that the Table Grape Commission's promotional campaigns are government speech. The court explained its rationale as follows:

> The detailed parameters and requirements imposed by the Legislature on the Commission and its messaging, the Secretary's power to appoint and remove Commission members, and the Secretary's authority to review the Commission's messages and to reverse Commission actions, lead us to conclude, based on the statutory scheme, that the Commission's promotional activities are effectively controlled by the state and therefore are government speech.

(*Delano Farms*, 185 Cal.Rptr.3d at 780.) This analysis flies in the face of *Gerawan II*, which established that a message does not claim the mantle of government speech merely because it is issued by a government-created entity whose members are chosen by the Secretary of CDFA. It is similarly not enough for that entity to speak within general parameters prescribed by statute or with the possibility of pro forma approval from the Secretary of CDFA. A court must find that the message was "*in fact* ... decided upon by the Secretary or other government official pursuant to statutorily derived regulatory authority." (*Gerawan II*, 33 Cal.4th at 28 (emphasis added).) Otherwise, the program is just a "mechanism of self-regulation by the producers ... themselves" and not speech of the government. (*Gerawan I*, 24 Cal.4th at 503 n.8.)

Under the analysis of the court below, every marketing order will be exempt from constitutional scrutiny, because under those loose criteria

every generic advertising program conducted by a government-empowered industry board will be government speech. But under that approach, there would have been no need for a remand in *Gerawan II* to examine *the facts*; the case could have been decided by reference to the bare language of the statutes.

Unlike in *Gerawan II*, here there is no uncertainty that the Secretary in fact exercised no control over the Commission, pro forma or otherwise. The facts are undisputed: "[T]he Secretary and the CDFA have, in practice, performed virtually no supervision of the Commission." (*Delano Farms*, 586 F.3d at 1229.) Here, there is no statutory requirement that the Secretary of CDFA attend Commission meetings, and no evidence that the Secretary, his designees, or any other governmentally accountable official has ever done so. (*Delano Farms*, 586 F.3d at 1229-30.) The Secretary "does not review advertising and promotional activities, nor does the State review the Commission's budgets." (*Ibid.*) Finally, it is undisputed that the CDFA possesses few, if any, documents that relate to the Commission's work. (*Ibid.*) The Court of Appeal nonetheless deemed it sufficient that "CDFA retains the authority to review the Commission's advertising," even if it had no statutory obligation to do so, and likewise failed to do so in practice. (*Delano Farms*, 185 Cal.Rptr.3d at 779) (citing *Delano Farms*, 586 F.3d at 1229).)

B. The Court of Appeal Erroneously Deferred to the United States Court of Appeals for the Ninth Circuit on a Question of State Constitutional Law

Instead of hewing to the dictates of *Gerawan II*, the Court of Appeal deferred to the flawed reasoning of the Ninth Circuit, which held that the promotional campaigns of the Table Grape Commission were government speech exempt from the First Amendment. (*Delano Farms*, 586 F.3d at 1230.) In conflict with *Gerawan II*'s emphasis on de facto control, the Ninth Circuit bypassed petitioners' emphasis on the "State's [lack of] effective control over the Commission." (*Id.* at 1229.) The Ninth Circuit "underscored that 'passivity is not an indication that the government cannot exercise authority,'" and held that the Commission's theoretical power to review the Commission's work—even if not required, and never exercised—was enough to shield the subsidies from constitutional review. (*Id.* at 1230.)

The Court of Appeal reasoned that "[w]hile California courts are not bound by decisions of the lower federal courts, they are persuasive and entitled to great weight." (*Delano Farms*, 185 Cal.Rptr.3d at 780 (citing *Barrett v. Rosenthal* (2006) 40 Cal.4th 33).) This observation inverts the rules of deference. While *Barrett* concerned state court deference to lower federal courts' interpretation of *federal* law, "state courts, in interpreting constitutional guarantees contained in state constitutions are independently responsible for safeguarding the rights of their citizens." (*People v.*