SUPREME COURT COPY

Case No. S226538

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.

CRC 8.25(b)

SUPREME COURT
FILED

MAR 21 2016

Frank A. McGuire Clerk

Deputy

AFTER A DECISION BY THE COURT OF APPEAL, FIFTH DISTRICT

Case No. F067956

Petitioners' Answer to the Amicus Curiae Brief of the California Department of Food and Agriculture

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INTRODUCTION

Unlike genuine government agencies, the Table Grape Commission ("TGC") is not represented in litigation by the State Attorney General—just as it receives no tax dollars, its budget is not subject to the legislative appropriations process or administrative review, and it is not audited by government auditors. Indeed, until this late stage in the litigation, the State of California and its relevant agency, the California Department of Food and Agriculture ("CDFA"), had stayed out of this case. That seemed odd, since Respondent claims to be engaging in "government speech." Now CDFA, represented by the Attorney General, has filed a brief *amicus curiae*, ostensibly in support of the TGC. But that brief is primarily focused on reasons why CDFA's *other programs* should survive even if this Court holds that the TGC is too independent of government control to render its promotional efforts "government speech." It provides no support for Respondent's claim of speaking in the name of the People of California.

First, CDFA explains that California uses a variety of institutional structures to regulate or promote agricultural commodities in the State. This explanation highlights the anomalous character of the TGC among agricultural promotion programs in California. By CDFA's own account, the TGC is virtually unique in its lack of review or oversight by CDFA. (*See* CDFA Br. at 8-15.)

If the legislature wished to subject the TGC to genuine control by a democratically accountable officer, it could easily do so, following the models used for other commodity promotion programs, as discussed in CDFA's brief. There is no practical—let alone compelling—reason why promotion of table grapes needs to be outsourced to a private, unaccountable industry group.

Second, CDFA endorses respondent's "government entity" theory for government speech—but the authority it cites, *Pleasant Grove City, Utah v. Summum* (2009) 555 U.S. 460, largely refutes the TGC's position. (*See* CDFA Br. at 15-16.) *Summum* supports the conclusion that without actual CDFA control of the TGC's speech, and without attribution of the speech to the government, the TGC cannot invoke a government speech defense.

ARGUMENT

A. CDFA Highlights that the TGC is an Outlier Among California Agricultural Committees that are Typically Controlled by the Government

CDFA devotes a substantial portion of its brief to explaining the importance of agricultural industries to California's economy, but this case is not a referendum on the value of California's agricultural industry. (*See* CDFA Br. at 4-9.) CDFA's excursus into economic geography does nothing to explain why out of 400 crops grown and marketed in this fertile state, only 31 are deemed to require collectivization of marketing. (Why

fresh carrots but not green beans? Why cherries but not plums, walnuts but not pecans, table grapes but not tangelos, blueberries, or Valencia oranges?) Nor does it explain why some marketing programs (e.g., pears and salmon) are tightly controlled by CDFA while table grape promotion is outsourced to a largely autonomous industry-dominated board. There is no consistent thread or rational pattern to these variegated arrangements, and CDFA does not even attempt to offer one.

This appeal is about the structure of only one marketing program. It presents the narrow question whether the promotional campaigns of the *TGC*, which are not reviewed or approved by any politically accountable government agency, are nonetheless government speech, such that TGC can compel petitioners to subsidize its speech without having to satisfy ordinary First Amendment standards for compelled speech. The CDFA amicus brief strongly suggests the answer to that question is "no."

CDFA candidly states that its reason for filing an amicus brief at this late stage in the litigation is its concern that "the legal principles established [in this case] may also apply to other marketing programs, to the extent their authorizing legislation, purpose and function, and messages are similar." (CDFA Br. at 2.) Fair enough. CDFA then goes on to describe how the TGC operates *differently* from other agricultural marketing programs in the State, which are designed on a "commodity-specific" basis. (*Ibid.*) CDFA catalogues the "wide array of marketing programs," (*id.* at

8), clarifies that "these programs take many forms," (*id.* at 9), and explains that the "Legislature has also developed new administrative structures for these programs," (*id.* at 10). An entire section of the brief is devoted to the proposition that "Agricultural Marketing Programs Operate Through a Variety of Means." (*Ibid.*)

Just so. The biggest difference among the programs lies in whether they are operationally overseen by a democratically accountable state agency—the very difference that this case is about.

In its understandable desire that other programs not be tarred with the table grapes brush, CDFA confirms that the TGC is an outlier. CDFA describes three different operative structures in California used to regulate and promote agricultural commodities: advisory boards, commissions, and councils. (*Id.* at 10.) Advisory boards and councils categorically lack the independent power to implement promotional programs. Advisory boards are just that—"advisory only." (*Id.* at 11.) As CDFA puts it, they "have no powers independent of the Department." (*Ibid.*) They may "recommend programs to the Department, and administer these programs subject to the Department's approval." (*Ibid.*) Similarly, "councils lack statutory authority to independently design and carry out their programs." (*Id.* at 13-14.) Like the boards, "councils make recommendations ... for their respective commodities, and administer those programs subject to the Department's approval." (*Id.* at 14.)

The dependence of boards and councils on CDFA approval sits in stark contrast to the practical and legal status of the TGC. The Secretary of CDFA exercises no de facto or routine control over the TGC's advertisement campaigns and has no statutory authority to do so. CDFA has authority to review TGC advertising messages only upon petition by an "aggrieved party"—and then its review is limited to certain narrow legal defects. (Cal. Food & Agric. Code § 65650.5.) As the factual record of this case makes clear, that review has never happened. (*See, e.g.*, Petitioners' Opening Brief on the Merits ("Pet. Br.") at 10, 14; Petitioners' Reply to Respondent's Answer Brief on the Merits ("Pet. Reply") at 14.) CDFA thus implicitly makes Petitioners' point: it points to not a single instance where the Secretary or his subordinates actually approved or disapproved (or even read) the TGC's advertising content.

As CDFA is at pains to establish, even the marketing programs conducted by commissions are distinguishable from the TGC. CDFA explains that "the purpose and function of the commissions vary according to the laws that created them," and the legislature has "provided the Department with a wide range of mechanisms for overseeing commissions." (CDFA Br. at 12.) The Ketchum Act, which created the TGC, was the first of the collective marketing programs passed by the legislature; subsequent agricultural research and advertising programs have invariably entailed greater governmental involvement, oversight, and

control. As CDFA explains, for example, unlike the TGC, other commissions are required to submit for CDFA approval annual statements of contemplated activity, including marketing, and annual budgets. (*Id.* at 13.) Notably, CDFA does not mention *even one* commission that, like the TGC, runs promotional campaigns with no government oversight or whose marketing program would be directly jeopardized by a reversal here.

CDFA's amicus brief confirms not only that is it "eminently practicable to design a commodity program with the government oversight necessary to confer constitutional immunity on a program's speech," (Pet. Reply at 18), but also that the California legislature has done exactly that in many instances. The programs that operate with actual CDFA supervision and true political accountability will not be disturbed if the Court reverses the decision below on the rationale advanced by petitioners here.

B. CDFA Fails to Demonstrate that the TGC's Promotional Campaigns are Government Speech

Parroting Respondent's brief, CDFA argues that "[t]here are two independent bases upon which an agricultural marketing program can be considered speech of the government," the first being "if the promoting speaker is itself a governmental entity." (CDFA Br. at 15.) The authority on which CDFA rests that argument, however, demonstrates the weakness of the argument. CDFA relies on *Pleasant Grove City, Utah v. Summum* (2009) 555 U.S. 460. *Summum* held that the monuments chosen by the

government for display in a public park qualify as government speech even though they were originally donated by private groups. When the Court observed in the opinion that "a government entity has the right to 'speak for itself,'" (CDFA Br. at 15 (quoting *Summum*, 555 U.S. at 467)), it took as a given that a government entity, for purposes of the government speech doctrine, must be a politically accountable body. The Court explained: "*of course*, a government entity is ultimately accountable to the electorate and the political process for its advocacy." (*Summum*, 555 U.S. at 468 (internal quotation marks omitted) (emphasis added).)

That is decidedly not the case here. As this Court already recognized, these marketing bodies are "not so much a mechanism of regulation ... of an agricultural commodity by a governmental agency, as a mechanism of self-regulation by the producers and handlers themselves." (*Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 503 n.8.) And even CDFA describes *Johanns* as a case involving the government's effort to "enlist a private speaker." (CDFA Br. at 16; *see also Johanns v. Livestock Marketing Assn.* (2005) 544 U.S. 550, 562 (explaining that the government "solicit[ed] assistance from nongovernmental sources [the Beef Board] in developing specific messages").)[1] If the Beef Board in *Johanns*

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[1] *Johanns* did not, as CDFA claims, distinguish the State Bar in *Keller v. State Bar of California* (1990) 496 U.S. 1 (which the U.S. Supreme Court held was *not* a government entity for First Amendment purposes) from *all* agricultural marketing boards and commissions. (*See* CDFA

was "a private speaker," as CDFA acknowledges, the TGC must be a "private speaker"—or a "nongovernmental speaker" in the U.S. Supreme Court's words—here.

Moreover, *Summum* recognized that an essential component of the political accountability that justifies the government speech exception to the First Amendment is that the audience for the message must reasonably perceive that message as emanating from the government. As the Court emphasized, the city "has selected those monuments that it wants to display for the purpose of presenting the image of the City that it wishes to project to all who frequent the park." (*Summum*, 555 U.S. at 473.) It was important to the holding of the Court that viewers attributed the monuments' messages to the city, as owner of the park:

> [P]ersons who observe donated monuments routinely—and reasonably—interpret them as conveying some message on the property owners' behalf. In this context, there is little chance that observers will fail to appreciate the identity of the speaker. ... Public parks are often closely identified in the public mind with the government unit that owns the land.

(*Summum*, 555 U.S. at 471-72.) This Court made the same point in *Gerawan II*. (*See Gerawan Farming, Inc. v. Kawamura* (2004) 33 Cal.4th 1, 28; Pet. Br. at 25-27.)

Br. at 17.) Rather, it distinguished the circumstances in *Johanns* from those in *Keller* because of the "*degree of government control over the message*" of the Beef Board, which was "developed under official government supervision." (*Johanns*, 544 U.S. at 561-62.)

Because the "monuments that are accepted ... are meant to convey and *have the effect of conveying* a government message," the Court concluded that they "constitute government speech." (*Summum*, 555 U.S. at 472 (emphasis added); *see also id.* at 481-82 (Stevens, J., concurring) ("Nor is it likely, given the near certainty that observers will associate permanent displays with the governmental property owner, that the government will be able to avoid political accountability for the views that it endorses or expresses through this means.").) CDFA's effort to discredit the attribution requirement is thus refuted by the very authority on which it relies. (*See* CDFA Br. at 18-19.)

Finally, the Court in *Summum* expressly endorsed the reasoning in *Johanns* that if the government "solicits assistance from nongovernmental sources" to develop a message, (*Summum*, 555 U.S. at 468 (quoting *Johanns*, 544 U.S. at 562)), it must "approve[] every word that is disseminated," (*Johanns*, 544 U.S. at 562), for the speech to qualify as the government's own. It was critical to the holding in *Summum* that the city, in choosing which privately-designed monuments to place in the park, had (as in *Johanns*) "'effectively controlled' the messages sent by the monuments in the Park by exercising 'final approval authority' over their selection." (*Summum*, 555 U.S. at 473 (quoting *Johanns*, 544 U.S. at 560-61).) That is not an alternative, independent basis for a government speech defense, but a necessary limiting condition where, as here, the speaker is

not itself a politically-accountable body. (*See* Pet. Br. at 17-27.) On the *facts*, CDFA does not dispute that its Secretary has never reviewed or approved a *single* TGC advertisement before it has been disseminated.

CDFA attempts to distinguish *Walker v. Texas Division, Sons of Confederate Veterans, Inc.* (2015) 135 S.Ct. 2239, on the superficial basis that *Walker* involved specialty license plates, whereas this case involves market promotion messages. (CDFA Br. at 19.) That is like distinguishing *New York Times Company v. Sullivan* (1964) 376 U.S. 254, on the basis that it involved a newspaper rather than a magazine. Even in this final argument, CDFA turns out to support Petitioner rather than Respondent. As CDFA describes *Walker*, "the State's review and approval of the messages" in *Walker* "transformed what were originally private messages into government speech." (CDFA Br. at 19.) Because in this case there was no CDFA "review and approval of the messages," the TGC's industry-contrived messages were not "transformed" into "government speech."

Remarkably for an amicus purportedly in support of the Respondent, CDFA concedes that unlike advisory boards that operate under the umbrella of the CDFA, commissions like the TGC are "not part of the Department," but are "instead separate ... entities." (*Id.* at 12.) For purposes of this case, CDFA claims that commissions are "separate *government* entities," (*ibid.* (emphasis added)), but elsewhere it has seized on the legal difference between these autonomous commissions and the State to foreswear state

liability for the commissions' actions. In *Country Eggs, Inc. v. Kawamura*, for example, CDFA successfully took the position that the State should not be required to pay a refund assessment owed by the Egg Commission because the commission was so separate and independent that the State was not liable for its debt. (*See* (2005) 129 Cal.App.4th 589.) CDFA argued, among other things, that the "State retained virtually no control over the Commission or its activities" and that the Egg Commission "acted in an independent, not an advisory role, when administering its program." (*See* Respondents' Br. filed in *Country Eggs Inc. v. Kawamura*, at 24-25, attached as Appendix A.) If an industry-run commission is not part of the State for purposes of liability, it is not part of the State for purposes of the government speech doctrine.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeal should be reversed and the case remanded for further proceedings.

Dated: March 18, 2016 Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Counsel for Petitioners hereby certifies that the number of words contained in this ANSWER TO THE AMICUS CURIAE BRIEF OF THE CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, including footnotes but excluding the Table of Contents, Table of Authorities, Issues on Review, and this Certificate, is 2,501 words as calculated using the word count feature of the computer program used to prepare the brief.

Dated: March 18, 2016

Respectfully submitted,

By: Michael W. McConnell

Michael W. McConnell

PROOF OF SERVICE

I declare that:

I am employed in the County of Fresno, California.

I am over the age of eighteen years and not a party to the within action; my business address is 701 Pollasky, Clovis, California 93612.

On March 18, 2016, I served a copy of the attached ANSWER TO THE AMICUS CURIAE BRIEF OF THE CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE on the interested parties herein by placing a true copy thereof in a sealed envelope, fully prepaid, and addressed as follows:

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I declare under penalty of perjury of the State of California that the foregoing is true and correct and that this Declaration was executed this 18 day of March, 2016, at Clovis, California. I declare that I am employed in the office of a member of the Bar of this Court at whose direction this service was made.

Kimberly R. Barker

Appendix A

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

COUNTRY EGGS, INC., a California corporation,

Plaintiff and Appellant,

v.

A.G. KAWAMURA, in his official capacity as the Secretary of the California Department of Food and Agriculture; CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE; and STATE OF CALIFORNIA,

Defendants and Respondents.

Case No. C046153

Sacramento County Superior Court No. 02AS04521
The Honorable Loren E. McMaster, Judge

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INTRODUCTION.

This action arises out of a series of disputes involving Country Eggs, Inc. (Country Eggs) and the California Egg Commission (the Commission), a public corporation that was dedicated to promotion of eggs and egg products.[1] In 1997, Country Eggs brought its first action against the Egg Commission in federal court, arguing that compelled payment of assessments to fund the Commission's generic promotion program violated the First Amendment. (*Country Eggs, Inc., et al. v. California Egg Commission, et al.*, United States District Court for the Eastern District of California, Case No. 97-0260 (*Country Eggs I*).) Believing that it was not going to prevail in that action, Country Eggs agreed to dismiss this federal court action and entered into a stipulated injunction requiring it to timely pay its assessments. These assessments are the subject of the present action.

In early 2000, Country Eggs brought another action against the Commission, this time in Sacramento County Superior Court. (*Country Eggs, Inc. v. Lyons, et al.*, Sacramento County Superior Court, Case No. 00AS01418 (*Country Eggs II*) Country Eggs prevailed in this action and obtained a monetary judgment for a refund of its assessments. Because the

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1. The Egg Commission conducted research and educational programs, as well as a generic egg promotion program. (Clerk's Transcript (CT) 282-283.) The "got milk?" and "IT'S THE CHEESE!" campaigns of the Fluid Milk Processors and California Milk Producers Advisory Boards are well-recognized examples of such programs' marketing efforts.

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Legislature declared that the State is not responsible for the Commission's debts (Food & Agr. Code, § 75070, subd. (a))[2], the trial court ordered that the monetary judgment was directed solely against the Commission. The Commission suspended its activities and expended its funds, and Country Eggs did not collect the full amount of its judgment from the Commission.

In the present action, Country Eggs seeks the uncollected portion of the Superior Court judgment, not from Commission, but from defendants A.G. Kawamura, in his official capacity as the Secretary of the California Department of Food and Agriculture (the Secretary), the California Department of Food and Agriculture (the CDFA),[3] and the State of California (collectively Defendants). Country Eggs's claims have two basic flaws.

First, Country Eggs is seeking a refund from the wrong parties. The remedy that Country Eggs seeks is a refund of assessments that it paid to the Commission. But the Commission is a separate entity from the Defendants, and the assessments collected by the Commission were under the exclusive control of the Commission. Requiring Defendants to reimburse the money paid to the Commission would oblige them to substitute money from the

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2. All statutory references are to the California Food and Agricultural Code unless otherwise noted.

3. The Secretary and the CDFA will be collectively referred to as the Department.

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State treasury for money paid to the Commission. This remedy would not be a "refund" but would instead be akin to a damages award. Because the trial court found that Country Eggs' claims for damages fail (Clerk's Transcript (CT 661-662), and Country Eggs has not appealed that finding (Appellant's Opening Brief (AOB) at pp. 16, 36-37), there is no legal theory upon which to base liability against the Defendants in this action.

Second, Country Eggs seeks a refund of assessments that it paid pursuant to a "voluntary stipulated injunction that plaintiff [Country Eggs] was to continue paying its assessments." (CT 659.) There is no due process violation, and no basis for a refund, because the assessments Country Eggs now seeks were made pursuant to a voluntary stipulation. Furthermore, these payments were made pursuant to a final federal court judgment. To award Country Eggs the refund that it seeks would be awarding relief from that judgment, a result barred by comity and the respect accorded final federal judgments.

Accordingly, Country Eggs' claims for a refund against the State, the Department and the Secretary fail, and the trial court's grant of summary judgment should be affirmed.

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