CASE NO. S226538

IN THE SUPREME COURT OF CALIFORNIA

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

Petitioners,

v.

THE CALIFORNIA TABLE GRAPE COMMISSION,

Respondent.

ANSWER TO PETITION FOR REVIEW

After Decision by the Court of Appeal, Fifth Appellate District,
Case No. F067956

On Appeal From the Superior Court for the State of California,
County of Fresno, Case Nos. 636636-3 (lead case), 642546, 01CECG1127,
01CECG2292, 01CECG2289, and 11CECG0178, Hon. Donald S. Black

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STATEMENT OF ISSUES PRESENTED

1. Whether the Court of Appeal correctly rejected petitioners' Free Speech challenge to mandatory assessments payable to the California Table Grape Commission ("Commission") where:

(a) the Commission's promotion program is effectively controlled by the California Department of Food and Agriculture ("CDFA");

(b) as an alternative basis for the judgment, the Commission is itself a government entity whose Commissioners are all appointed and subject to removal by CDFA's Secretary; and

(c) as an alternative basis for the judgment, the summary judgment record establishes that the Commission's promotion work is narrowly tailored to the State's important interest in preserving and expanding demand for California table grapes.

2. Whether the Court of Appeal erred where—in adjudicating the government speech doctrine under the Free Speech Clause of the California Constitution—it gave respectful consideration to the Ninth Circuit's interpretation of the same doctrine under the First Amendment for its persuasive value.

INTRODUCTION

The California Legislature created the California Table Grape Commission ("Commission")—whose members are all appointed, and subject to removal, by the Secretary of the California Department of Food and Agriculture ("CDFA")—to conduct a variety of activities designed to benefit the State by promoting California table grapes. Petitioners assert that being required by statute to pay for the Commission's promotional activities violates their constitutional rights to free speech. The Court of Appeal and Superior Court carefully considered this argument and rejected it on the ground that the Commission's speech is "government speech." The Superior Court also concluded that, independent of the government speech doctrine, the statute authorizing the Commission is constitutional under intermediate scrutiny because it directly advances California's important interest in strengthening its agricultural economy and does so in a narrowly tailored fashion. There is no reason for this Court to review these well-reasoned decisions.

Petitioners do not identify any disagreement in the courts of appeal that requires the attention of this Court. Indeed, in the ten years since the U.S. Supreme Court relied on the government speech doctrine to reject a First Amendment challenge to the federal beef promotion program in *Johanns v. Livestock Marketing Association* (2005) 544 U.S. 550, not a

single commodity promotion program has been found unconstitutional under the Free Speech Clause of the U.S. or California Constitutions.

Petitioners nonetheless strain to create a basis for review by misreading precedent, mischaracterizing the decisions below, and ignoring the Superior Court's intermediate scrutiny findings. In the process, petitioners veer from incorrectly accusing the lower courts of deferring to the U.S. Court of Appeals for the Ninth Circuit on a question of state law to inviting this Court to split with the Ninth Circuit on a question of federal law.

Petitioners' entire argument for review boils down to a theory that government speech requires day-to-day micromanagement of the Commission's work by CDFA. That contention is doubly wrongly. *First*, as the Court of Appeal correctly concluded, government accountability does not depend on whether a CDFA official attends a particular meeting. The relevant question is whether CDFA has the *legal authority* to control the Commission, as it plainly does. *Second*, because the Commission is itself a *government entity*, it would make no sense to condition the applicability of the government speech doctrine on oversight by *another government entity*.

Petitioners' insistence on day-to-day CDFA control over the Commission's advertisements is especially puzzling because petitioners' claims have nothing to do with the content of the Commission's work. In

their words, petitioners are "basically oblivious to what the Commission does." (Clerk's Transcript on Appeal "CT" 8:1869.)[1] Their only objection is to paying for the Commission's generic advertising of table grapes—i.e., the very message that the California Legislature selected when it enacted the Ketchum Act. Petitioners' claims thus run head-on into the core premise of the government speech doctrine: "'Compelled support of government'—even those programs of government one does not approve—is of course perfectly constitutional, as every taxpayer must attest." (*Johanns*, *supra*, 544 U.S. at 559.)

Petitioners have failed to show any error in the well-reasoned decision of the Court of Appeal. But even if they had, review would still be inappropriate. As the Superior Court correctly concluded, the Ketchum Act is constitutional under intermediate scrutiny. That alone would be fatal to petitioners on remand and thus obviates the need for this Court's review.

This litigation has been pending for fifteen years. It is time to bring it to a close. Whether commodity promotion programs are good or bad policy is a question for the Legislature, not the courts. The Legislature has spoken, and there is no basis for overturning its judgment.

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[1] In citations to the CT, the number preceding the colon is the relevant volume and the number following the colon is the relevant page.

STATEMENT OF THE CASE

A. THE CALIFORNIA TABLE GRAPE COMMISSION

The Commission was created by the Legislature in 1967 following a period of steadily declining per capita consumption of California table grapes. (Food & Agric. Code §§65550, 65551; CT-2:361 [Def. CTGC's Separate Statement of Undisputed Material Facts ["CTGC SSUMF"] ¶48].) Its purpose is to serve the "interests of the welfare, public economy and health of the people of [the] state" by maintaining and expanding demand for California table grapes. (Food & Agric. Code §65500(f); *see also id.* §63901.4.)[2]

The Legislature authorized the Commission to engage in a range of demand-expanding activities, including "promot[ing] the sale of fresh grapes by advertising and other similar means"; working with "the wholesale and retail trade"; working with "state, federal and foreign agencies on matters which affect the marketing and distribution of fresh grapes"; and "conduct[ing] and contract[ing] with others to conduct[] scientific research" related to fresh grapes. (Food & Agric. Code

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[2] The Ketchum Act, which created the Commission, authorized it to begin operations once approved in a referendum of California table grape growers. (Food & Agric. Code §65573.) The Act also requires California table grape producers to vote every five years on whether to continue the Commission. (*Id.* §65675.) Growers have voted to do so by overwhelming majorities. (CT-3:487 [Nave Decl. ¶6].)

§65572(h), (i), (k).) Based on this statutory direction, the Commission conducts a variety of activities to maintain and expand demand for California table grapes. Advertising—the focus of petitioners' claims—is just one of those activities; in 2011-2012, it accounted for only about 20% of the Commission's expenditures. (CT-3:492 [Nave Decl. ¶34]; *see generally* CT-8:1717-1734 [Joint Statement of Stipulated Facts ["SF"] ¶¶16-72 [describing activities]; CT-3:491-527 [Nave Decl. ¶¶33-150].)

The Commission's efforts have been highly successful. Econometric analysis demonstrates that the Commission's advertising and other promotion activities significantly increase demand. (CT-2:373-376 [CTGC SSUMF ¶¶124-141]; CT-7:1365, 1369-1375 [Alston Decl. ¶¶9, 23-34].) The Commission's international trade and issue management activities have helped open foreign markets, like India and China, to California table grapes and keep markets open. (CT-8:1729-1733 [SF ¶¶54-61].) The Commission's research efforts have contributed to the development of numerous new grape varieties. (CT-8:1719 [SF ¶¶23-24]; CT-2:372-373 [CTGC SSUMF ¶¶118-123]; CT-3:496-499 [Nave Decl. ¶¶43-56].)

The Commission's work is funded primarily through assessments imposed by the Ketchum Act on shipments of California table grapes. The assessment rate has been set at $0.006087 per pound of grapes since before petitioners filed these actions. (*See* CT-3:558-574 [Nave Decl. Ex. 2].)

Those assessments are paid by shippers who are authorized to collect the assessments from growers. (Food & Agric. Code §§65600, 65604, 65605.)

The Legislature created the Commission as a public corporation. (*See* Food & Agric. Code §65551; CT-8:1734 [SF ¶74].) Its governing board consists of 18 growers and one non-grower. All board members are appointed—and removable—by the Secretary of CDFA. (Food & Agric. Code §§65550, 65553-65554, 65563, 65575.1; CT-8:1735 [SF ¶76].) CDFA also supervises the nomination of producers eligible for appointment by the Secretary.[3] (CT-8:1734 [SF ¶75].) As a government agency, the Commission is subject to numerous laws governing public entities. (CT-8:1735-1736 [SF ¶85]; *see infra* pp. 21-22.)

CDFA has broad authority to oversee the Commission's operations. The Secretary of CDFA appoints and can remove all members of the Commission. (CT-8:1735 [SF ¶76].) The Commission is subject to audit by CDFA and the Department of Finance. (CT-8:1736 [SF ¶89]; Food & Agric. Code §65572(f).) The Department of Finance conducted a fiscal and compliance audit in 2009 (CT-8:1736 [SF ¶89]); CDFA-approved

[3] Under the Secretary's oversight, growers hold nominating meetings followed by elections to determine whom they will recommend for appointment; the Secretary then decides whom to appoint and appoints that person. (CT-8:1735 [SF ¶76].)

independent auditors have subsequently conducted such audits pursuant to CDFA procedures (CT-3:488-489 [Nave Decl. ¶16]).

On the petition of an aggrieved party, the Secretary of CDFA may "reverse [an] action of the commission" if the action was "not substantially sustained by the record, was an abuse of discretion, or illegal." (Food & Agric. Code §65650.5; CT-8:1735 [SF ¶79].) Petitioners have never filed a grievance challenging the Commission's advertising. (CT-2:357 [CTGC SSUMF ¶20].) Indeed, they stipulated that "[t]he Commission has not run political or ideological advertisements" and its "advertisements have not promoted products other than grapes." (CT-8:1721 [SF ¶28].) CDFA also "reserves the right to exercise exceptional review of advertising and promotion messages wherever it deems such review is warranted." (CT-3:686 [CDFA, *Policies for Marketing Programs* C-3 (4th ed. 2006)].)

B. PLAINTIFFS' CHALLENGES

Petitioners are California table grape growers and shippers who object to paying assessments to fund the Commission's activities. The purported basis for petitioners' objection is that the Commission's advertisements are "designed to promote table grapes as though they were a generic commodity," whereas petitioners allegedly prefer to market their own table grapes. (CT-13:3112; CT-1:199-200; CT-1:163; CT-1:250-251.)

Petitioners' witnesses uniformly testified at their depositions that they are unfamiliar with the substance of the Commission's activities and

the content of the Commission's ads. (CT-2:358-360 [CTGC SSUMF ¶¶30-35 [citing depositions]].) In fact, in their Superior Court briefing, petitioners boasted that they "don't know what the Commission is doing, don't care what the Commission is doing, and have no use for the Commission." (CT-8:1854.) In their words, they are "basically oblivious to what the Commission does." (CT-8:1869.)

For years, petitioners' challenges were stayed or dormant while awaiting decisions in other cases involving similar free speech challenges to commodity promotion programs, including a parallel First Amendment challenge brought by Petitioner Delano Farms in federal court. In 2009, the Ninth Circuit resolved that challenge in favor of the Commission, holding that the Commission's speech is government speech. (*Delano Farms Co. v. California Table Grape Comm'n* (9th Cir. 2009) 586 F.3d 1219, 1220.)

Litigation in the Superior Court eventually resumed to address various combinations of claims under the First Amendment of the U.S. Constitution, the Free Speech Clause of the California Constitution, and the Liberty, Privacy, and Due Process Clauses of the California Constitution. The questions that petitioners present in their petition for review relate exclusively to petitioners' free speech claims under Article I of the California Constitution. (Pet. 1.)

C. THE SUPERIOR COURT'S ORDER

In May 2013, Judge Black granted the Commission's motion for summary judgment. (CT-13:3127-3180.) Applying relevant precedent, Judge Black rejected petitioners' federal and state speech claims. (CT-13:3139-3158.) He held that the Commission is a "governmental entity" and that its speech is thus necessarily "government speech" that can be funded with compelled assessments. (CT-13:3157-3158.)

In the alternative, Judge Black held that the Ketchum Act satisfies intermediate scrutiny. He concluded that there is a "substantial interest" in maintaining and expanding the market for California table grapes and the Commission's activities directly advance that interest. (CT-13:3162.) Judge Black noted that the Commission "produced ample evidence of the effectiveness of" its work. (CT-13:3168.) Petitioners, in contrast, "produce[d] *no* evidence contesting the evidence of the Commission's effectiveness." (*Ibid.* [emphasis added].) Judge Black also found the Ketchum Act narrowly tailored, concluding based on "undisputed facts that absent the Commission's work, the California table grape industry would engage in less than the economically rational amount of advertising and promotion." (CT-13:3163.)[4]

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[4] Judge Black rejected petitioners' liberty, privacy, and due process claims. Judge Black also denied various motions to strike the

D. THE COURT OF APPEAL'S DECISION

The Court of Appeal, Fifth Appellate District affirmed in a unanimous decision holding that "[t]he Commission's promotional activities constitute government speech." (*Delano Farms, Co. v. California Table Grape Comm'n* (2015) 235 Cal.App.4th 967, 971.) The court began by reviewing the statutory and regulatory provisions that govern the Commission's operations and the evolution of the case law from early challenges to the current consensus that the government speech doctrine applies under both the U.S. and California Constitutions. (*Id.* at 971-978.)

The court then discussed the Ninth Circuit's decision in *Delano Farms* (*supra*, 586 F.3d 1219), which had held that the Commission's speech is government speech for purposes of the First Amendment of the U.S. Constitution for two different reasons: (1) the Commission is a government entity, and (2) the Commission's message is effectively controlled by the state. (235 Cal.App.4th at 978-980.) The Court of Appeal acknowledged that "California courts are not bound by decisions of the lower federal courts," but concluded that the Ninth Circuit's decision was "persuasive." (*Id.* at 980.)

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uncontradicted declarations of the Commission's expert witnesses (CT-13:3133-3138) and overruled petitioners' remaining "[b]lunderbuss [evidentiary] objections" as "procedurally improper on a number of grounds" (CT-13:3136).

The Court of Appeal explained:

> 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.

(*Ibid.*) The court then concluded that because the Commission's speech is government speech, petitioners' challenges under the U.S. and California Constitutions both fail.

Having concluded that the Commission's speech was effectively controlled by the state, the Court of Appeal did not need to "decide whether the Commission is a government entity or whether the Ketchum Act survives intermediate scrutiny." (*Delano Farms*, *supra*, 235 Cal.App.4th at 980.) The Superior Court had ruled for the Commission on both points, and each would have provided an independent ground for supporting the judgment.

REASONS FOR DENYING THE PETITION

A. THERE IS NO DISAGREEMENT IN THE LOWER COURTS

Petitioners do not even attempt to argue that review by this Court is necessary "to secure uniformity of decision" in the lower courts. (Cal. R. Ct. 8.500(b)(1).) In the ten years since the U.S. Supreme Court relied on the government speech doctrine to reject a First Amendment challenge to the federal beef promotion program in *Johanns* not a single commodity

promotion program has been found unconstitutional under the Free Speech Clauses of the U.S. or California Constitutions.[5]

Each of these cases arose on its own statute and addressed the particular government speech theories presented by the parties. Consistent with this variation, the cases have recognized that there are multiple ways for speech to qualify as government speech. But the absence of any decision invalidating a commodity promotion program since *Johanns*—and

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[5] *See Delano Farms*, *supra*, 586 F.3d at 1227-1230; *Gallo Cattle Co. v. Kawamura* (2008) 159 Cal.App.4th 948, 955-963; *Paramount Land Co. v. California Pistachio Comm'n* (9th Cir. 2007) 491 F.3d 1003, 1009-1012; *Felix Costa & Sons v. Kawamura* (Super. Ct. Sacramento County, 2010, No. 03AS03433, Dkt. 66), at 2-5 [applying *Gallo* and *Johanns* and granting summary judgment on free speech claims]; *Duarte Nursery, Inc. v. California Grape Rootstock Improvement Comm'n* (Super. Ct. Sacramento County, 2010, No. 00AS02731, Dkt. 53) at 3-5 [applying *Gallo* and *Johanns* and granting summary judgment on free speech claims]; *LJT Flowers, Inc. v. California Cut Flower Comm'n* (Super. Ct. Sacramento County, 2010, No. 06AS02243, Dkt. 150) at 2-4 [applying *Gallo* and *Johanns* and granting summary judgment on free speech claims]; *Cochran v. Veneman* (3d Cir. Sept. 15, 2005, No. 03-2522), 2005 WL 2755711, at *1; *American Honey Producers Ass'n v. USDA* (E.D. Cal. May 8, 2007, No. 05-1619), 2007 WL 1345467, at *9, *11; *In re Wilson* (U.S.D.A. Nov. 28, 2005, No. 01-0001), 2005 WL 3436555, at *16-19; *Cricket Hosiery, Inc. v. United States* (Ct. Int'l Trade 2006) 429 F. Supp. 2d 1338, 1343-1346; *Avocados Plus Inc. v. Johanns* (D.D.C. 2006) 421 F. Supp. 2d 45, 50-55; *In re Gerawan Farming, Inc.* (U.S.D.A. May 9, 2008, No. 02-0008) 2008 WL 2213514, at *6-8; *In re Red Hawk Farming & Cooling* (U.S.D.A. Nov. 8, 2005, No. 01-0001) 2005 WL 3118142, at *8-13; *Dixon v. Johanns* (D. Ariz. Nov. 21, 2006, No. CV-05-03740) 2006 WL 3390311, at *12-13. *See also In re Tourism Assessment Fee Litig.* (9th Cir. 2010) 391 F. App'x 643, 645-646 [upholding mandatory assessments by Travel and Tourism Commission for promotion].

the absence of any dissent from the Court of Appeal's decision here—is compelling evidence that the lower courts already have sufficient guidance to decide the cases that come before them.

B. THE COMMISSION'S SPEECH IS GOVERNMENT SPEECH

Petitioners do not dispute that the government speech doctrine applies to free speech claims under Article I of the California Constitution and that the collection of assessments to fund government speech is lawful. Nor do they dispute that the U.S. Supreme Court's decision in *Johanns* applies to government speech questions under the California Constitution. Petitioners instead focus on arguing that the Commission's speech is not government speech *under Johanns*. But their attacks on the lower courts' application of *Johanns* in this case are both insubstantial and undeserving of this Court's review.

The Commission's activities qualify as "government speech" in two distinct ways. First, as the Court of Appeal correctly concluded, the Commission's message is effectively controlled by the State. Second, the Commission is itself a government entity and its speech is thus necessarily government speech. Each of these grounds is independently sufficient to support the judgment. Together, they conclusively rebut petitioners' attempt to manufacture an issue for review.

1. The State Of California Effectively Controls The Commission's Speech

The Commission's speech is "government speech" because the State effectively controls the Commission's message, as the Court of Appeal correctly held. The speech of a commodity marketing program is government speech—whether or not the marketing board is itself governmental—if "[t]he message of the promotional campaign is effectively controlled by the [government] itself." (*Johanns*, *supra*, 544 U.S. at 560.)[6] For example, in concluding that, in the beef program, the speech of the Operating Committee was subject to effective government control, the *Johanns* Court relied on the fact that "Congress ha[d] directed ... a 'coordinated program' of promotion, 'including paid advertising.'" (*Id.* at 561.) The Court further explained that "Congress and the Secretary [of Agriculture] ha[d] set out the overarching message"—promoting "the image and desirability of beef"—while "le[aving] the development of the remaining details to an entity whose members are *answerable* to the Secretary (and in some cases appointed by him as well)." (*Ibid.* [emphasis added].) In addition, Congress "retain[ed] oversight authority" over the

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[6] In *Johanns*, the Court assumed for purposes of its decision that the Operating Committee—which designed the beef ads—was "a nongovernmental entity." (*Supra*, 544 U.S. at 560 & n.4.)

beef program and "the ability to reform the program at any time." (*Id.* at 563-564.) Finally, the Court noted that the Secretary took the extraordinary step of reviewing the Operating Committee's advertisements, although it stressed that far from setting a floor that must be met in all cases, this degree of control was "*more* than adequate." (*Id.* at 563 [emphasis added].)

The Commission's program is also effectively controlled by the government. *First*, the Commission was created by statute. (*E.g.*, Food & Agric. Code §65551.) To this day, the Commission continues to exist solely by virtue of California Law, and its mandate could be changed at any time by the Legislature. (*Ibid.*)

Second, whereas USDA's Secretary had the power to appoint only half of the relevant entity (the "Operating Committee") in the beef program, (*Johanns*, *supra*, 544 U.S. at 560), "*[a]ll* of the Commissioners of the Commission are appointed and subject to removal by the Secretary" of CDFA. (CT-8:1735 [SF ¶76] [emphasis added]; *see also* Food & Agric. Code §§65550, 65556, 65563, 65566, 65575.1; *Delano Farms*, *supra*, 586 F.3d at 1228-1229 [CDFA's appointment power with respect to the Commission "is greater than … the Secretary of Agriculture's power in *Johanns*"].) This is no small matter: Under both federal and California law, the power to appoint and remove is the linchpin of executive control and governmental accountability across a variety of contexts. (*E.g.*, *Howard Jarvis Taxpayers' Ass'n v. Fresno Metro. Projects Auth.* (1995) 40

Cal.App.4th 1359, 1388 ["[T]he essence of [public] accountability includes the power to remove."]; *Bowsher v. Synar* (1986) 478 U.S. 714, 726; *Delano Farms*, *supra*, 586 F.3d at 1229.)

Third, while, in *Johanns*, the government had set out only "the overarching message" of the beef program "and some of its elements," (*Johanns*, *supra*, 544 U.S. at 561), the Legislature "was quite specific about its expectations for the Commission and its messaging." (*Delano Farms*, *supra*, 586 F.3d at 1228; *see, e.g.*, Food & Agric. Code §§65500(f) 63901, 65572(h).) Through this meticulous command, the California Legislature went "much further in defining the Commission's message than the Beef Order's general directive." (*Delano Farms Co. v. California Table Grape Comm'n* (2015) 235 Cal.App.4th 967, 979 [quoting *Delano Farms*, *supra*, 586 F.3d at 1228].)

Indeed, petitioners' rhetoric about government control and democratic accountability rings hollow in the face of this detailed mandate. Petitioners themselves are not complaining about the manner in which the Commission fulfills this Legislative mandate or any alleged deviation from the prescribed message. Nor could they, as none of the petitioners is even familiar with the contents of the Commission's advertising. (CT-2:358-360 [CTGC SSUMF ¶¶30-35 [citing depositions]].) Instead, it is precisely the message prescribed by the Legislature—promoting California grapes generically—that petitioners object to funding.