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.

AFTER A DECISION BY THE COURT OF APPEAL, FIFTH DISTRICT

Case No. F067956

Petitioners' Opening Brief on the Merits

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ISSUES ON REVIEW

As stated in our Petition for Review, the issues on review are as follows:

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.

As stated in the Answer to Petition for Review, the issues on review are as follows:

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 persuasive value.

INTRODUCTION

Both this Court and the United States Supreme Court have long recognized the threat to freedom of speech when essentially private industry groups are delegated the power to legally compel *all* participants in the industry to support advertising that serves the interests only of *some*. The U.S. Supreme Court has held one such program unconstitutional and this Court has required that such programs be held to heightened constitutional scrutiny. (*United States v. United Foods* (2001) 533 U.S. 405; *Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468 (*Gerawan I*); *Gerawan*

Farming, Inc. v. Kawamura (2004) 33 Cal.4th 1 (*Gerawan II*).) Entities like the California Table Grape Commission ("TGC" or "the Commission") occupy a dangerous middle ground between public and private; they are able to pursue essentially private objectives, but with the full power of the state to enforce their will. They are subject to the discipline neither of the market nor of the ballot box. This Court has made clear that the only way this kind of program can be conducted consistently with the free speech clause of the California Constitution is to subject the conduct of the program to active supervision and genuine control by democratically accountable officials. The U.S. Supreme Court similarly upheld the constitutionality of compelled contributions to advertising of the national Beef Board precisely because of active control by federal officials over "every word" of the advertising. (*See Johanns v. Livestock Marketing Association* (2005) 544 U.S. 550.)[1]

The court below did not see it that way. Misled by a Ninth Circuit opinion upholding the TGC's actions under the federal Constitution, based on a patently erroneous interpretation of *Johanns*, (*see Delano Farms v. California Table Grape Commission* (9th Cir. 2009) 586 F.3d 1219, 1229), the court below held that the TGC may compel these plaintiffs to contribute to its advertising program, which benefits TGC members but hurts these

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[1] Similar concerns about such entities exist under the antitrust laws. (*See North Carolina State Bd. of Dental Examiners v. FTC* (2014) 135 S.Ct. 1101.)

plaintiffs, even when the relevant politically accountable body, the California Department of Food and Agriculture ("CDFA") exercises no actual supervision or control.

Much of this brief will be devoted to a detailed description of the operations of the TGC and the CDFA, to make clear that the TGC, in actual practice, is effectively autonomous. But this is undisputed. The court below acknowledged that, "[u]nlike the [federal] Beef Order [upheld in *Johanns*], [California law] does not require any type of review by the Secretary over the actual messages promulgated by the Commission." (*Delano Farms Co. v. California Table Grape Commission* (2015) 185 Cal.Rptr.3d 771, 779.) "The Beef Board and the Operating Committee submit all plans to the U.S. Secretary of Agriculture for final approval"; the Table Grape Commission does not. (*Ibid.*) In point of fact, the CDFA does not even see the advertising before it is run, and has no way to know whether it is promoting the private interests of the dominant players of the TGC to the injury of independents like the plaintiffs. The court below held that this does not matter: "Even if the Secretary does not exercise this authority and intervene in message development," the constitutional requirements were satisfied. (*Ibid.*)

That is the issue presented. Plaintiffs contend that unless the CDFA is required to review and approve TGC's messages and in fact (not in theory) does so, the free speech inquiry demanded by *Gerawan I* and *Gerawan II* is applicable. The TGC, defending the court below, contends that no

constitutional scrutiny is necessary so long as the members of the TGC are appointed by the CDFA and the CDFA has authority to review the message in exceptional cases, even if that authority is never exercised. The governing precedents of both this Court and the U.S. Supreme Court show that the TGC is wrong.

STATEMENT OF THE CASE

A. Plaintiffs and the Table Grape Commission

Plaintiffs Delano Farms Company, Blanc Vineyards, LLC, Gerawan Farming, Inc., Four Star Fruit, Inc., and Bidart Brothers, are independent grape farmers and shippers who do business in the competitive agricultural industry of California. All are family businesses, and some have been operating in the state for decades. All of the plaintiffs grow, market, and ship their own grapes. (13 CT 3106:25-3107:1; 1 CT 158:12-14; 1 CT 195:2-6; 1 CT 246:2-7.)[2] Delano Farms, for example, grows table grapes on 6,000 acres in Kern County, California. It ships only the grapes it grows and harvests itself, and sells under its own brand name. (13 CT 3106:25-3017:1.) 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

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[2] Plaintiffs filed separate complaints that were consolidated below. While the facts specific to each company differ slightly, the allegations pertinent to this appeal are materially the same. For ease of citation, this petition will hereinafter cite the Delano Farms' Amended Complaint, filed February 20, 2013.

3107:1-2.) As independent producers and marketers, Delano Farms and the other plaintiffs 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 distinctive *terroir*, care, and skill of their growers.[3]

Defendant-Respondent Table Grape Commission is a public corporation created under the Ketchum Act of 1967. (*See* Cal. Food & Agric. Code § 65550, *et seq.*) It is governed by a board composed of eighteen table grape growers—three from each of the state's six active grape-growing districts—and one "public member." (*See id.* § 65575.1.) These board members are elected by the table grape producers of each district, and then appointed by the Secretary of CDFA. (*See id.* § 65550.) The Ketchum Act empowers the commissioners to impose assessments on all producers of table grapes in California, which they use in their discretion for generic advertising, education, marketing, research, and government-relations efforts. (*Delano Farms*, 185 Cal.Rptr.3d at 773.)

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

California produces 400 agricultural crops, but only fifty three are regulated at all by a marketing order or commission. (8 CT 1746:2-8.) The authorities and degree of autonomy of each of these commissions is different. (*See* 8 CT 1746:12-19.) Only a handful of California's crops are subject to a mandatory generic advertising regime; tomatoes and oranges, for example, are not. (8 CT 1746:16-23.) Some advertising programs—like the California Pear Marketing Program—are conducted by an essentially advisory industry board that merely makes recommendations to CDFA, which in turn decides what policies to pursue.[4] On the other end of the spectrum is the TGC, which, as a practical matter, functions with near-total autonomy. Other than the sole public member, the TGC commissioners are, by definition, competitors of these Plaintiffs, whose interests necessarily diverge. Nothing in the statutory scheme under which they operate precludes the commissioners from voting their own private interests.

The TGC operates independently of CDFA in a variety of ways. 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

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[4] (*See* California Pear Marketing Program, *available at* http://www.cdfa.ca.gov/mkt/mkt/ordslaws.html.)

the commission." (Cal. Food & Agric. Code § 65572(b).) The Commission may "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," (*id.* § 65572(e)), and it 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," (*id.* § 65551). Tellingly, the statute proclaims that "[t]he State of California shall not be liable for the acts of the commission or its contracts." (*Id.* § 65571.)

The Commission also has discretion, within a statutory cap, to set the rate of assessments that table grape growers are required to pay to fund the Commission's speech-related activities, including its promotional advertisement campaigns. (*Id.* §§ 65572(*l*), 65500(f).) 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." (*Id.* § 65572(i).) In effect, the Commission requires all table grape growers to devote a portion of the resources available to product advertising to collective promotion of grapes as an undifferentiated commodity. The Commission has the power to sue producers for payment, civil penalties, or injunctive relief in the event of nonpayment of any assessment. (*See id.* §§ 65572(g), 65650.)

Over the past several years, the Commission has imposed an assessment on plaintiffs of about 13¢ per box of table grapes, which (depending on the plaintiff) 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. (13 CT 3108:1-14; 1 CT 158:24-160:6; 1 CT 196:7-14; 1 CT 246:14-247:10.) In the 2010-2011 fiscal year, table grape producers and shippers paid $11,414,755 in assessments, a large portion of which was spent on speech-related activities, including paid advertising, education outreach, consumer research, and international marketing. (8 CT 1715:27-1718:27.) Delano Farms has been paying at least $600,000 in assessments each year beginning with the 2000-2001 crop season. (13 CT 3108:5-9.)[5] Any advertising or promotion of its own product is on top of this—and to the extent that Delano Farms' business strategy is to differentiate its product from that of its generic competitors, the Commission's generic message conflicts with Delano Farms' own message. (13 CT 3112:3-20.)

Most relevant to this lawsuit, the Commission has discretion over the content of promotional campaigns and is not required to seek the approval of

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[5] By agreement of the parties, plaintiffs' assessments since the beginning of this litigation have been deposited in plaintiff-specific and segregated escrow accounts, pending the outcome of the case. (*See, e.g.*, 1 CT 177:9-12.)

the Secretary of CDFA before running its assessment-funded advertisements. (*See* Cal. Food & Agric. Code § 65572(h-k).) In fact, under the Ketchum Act, CDFA has authority to review the TGC advertising messages *only* upon petition from an "aggrieved party" and only for narrow legal defects: to determine whether the Commission's action is "not substantially sustained by the record, was an abuse of discretion, or illegal." (*See id.* § 65650.5.) Similarly, CDFA's own policy manual, under the heading "*Non-routine* Review," claims no general oversight power over the Commission but merely "reserves the right" for CDFA to "exercise exceptional review" of the Commission's advertisements. (3 CT 686 (emphasis added); *see also Delano Farms*, 185 Cal.Rptr.3d at 773-74.) But CDFA has *never* exercised even this non-routine, exceptional review. It is undisputed that "the Secretary and the CDFA have, in practice, performed virtually no supervision" of the Commission's activities generally, and have never overseen or approved the content of the Commission's advertisements. (*Delano Farms*, 586 F.3d at 1229-30.)

The record is also clear that the ads the Commission publishes are neither attributed to the State of California nor to the CDFA. (*See* 8 CT 1743:25-1744:2; 9 CT 2045:6-2046:7.) The ads all bear the same circular logo with the name "Grapes from California" on the perimeter, and a bundle of grapes in the middle. This logo gives the impression that the ads are the commercial message of California grape producers, or of a private company

whose branding emphasizes the homegrown character of its product. Many of the ads direct viewers or listeners to "grapesfromcalifornia.com," the TGC's website. (2 CT 448-467.) Tellingly, the URL for this website is .com—not ca.gov, as one would expect if the messages were governmental. There is no reason consumers would infer these messages flow from the state.

Moreover, the TGC's ads are entirely generic, making no distinction among the varieties and quality of grapes produced in California. This advances the notion that California grapes are all the same. (*See* 2 CT 448-467.) As the record demonstrates, some growers benefit and others lose from this sales approach, depending on whether they wish to differentiate their products from those of their competitors. (13 CT 3112:3-20.)

B. The Proceedings Below

Plaintiffs filed six complaints that were later consolidated in the Superior Court of California, County of Fresno, Central Division. Plaintiffs alleged 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 3115:14-16.) They asserted that the assessments to fund the Commission's advertisements were an unconstitutional compelled subsidy of speech, which 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.)

During discovery, plaintiffs presented evidence to support their claim that the Commission's generic ads, by marketing all California table grapes collectively, and thus generically, harm their ability to promote and distinguish their own high-quality products. (*Cf. 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).) Plaintiffs argued that they should not be "forced to pay money to a group of competitors" to spend as those competitors wish even if "counterproductive" to plaintiffs' aims. (8 CT 1744:22-1745: 4, 1782:19-1783: 2.)

On May 22, 2013, the Superior Court granted the California Table Grape Commission's motion for summary judgment on the grounds that the Commission is a "government entity" whose speech is therefore government speech, the compelled subsidy of which does not violate the free speech clause. (*See Delano Farms,* 185 Cal.Rptr.3d at 774.) The California Court of Appeal, Fifth District, affirmed on alternative grounds. (*See id.* at 775-80.) The court deferred to the Ninth Circuit's decision in *Delano Farms Co. v. California Table Grape Commission* (9th Cir. 2009) 586 F.3d 1219, which had recently held that the same subsidies were immune from constitutional

review under the First Amendment of the U.S. Constitution as interpreted by the U.S. Supreme Court in *Johanns v. Livestock Marketing Association* (2005) 544 U.S. 550. In *Johanns*, the Supreme Court held that the national Beef Board could compel subsidies of its promotional campaigns without First Amendment review because the messages conveyed in those campaigns were government speech.

Despite the fact that this Court had rendered two opinions setting forth the constitutional standards that govern compulsory agricultural marketing programs (*Gerawan I* and *Gerawan II*) the appellate court relied entirely on the analysis of the Ninth Circuit. The sole reference to this Court's decision in *Gerawan II* on the subject of government speech was one line stating: "As to the Secretary's government speech claim, the *Gerawan II* court concluded that it could not be resolved on the pleadings and required further factfinding." (*Delano Farms*, 185 Cal.Rptr.3d at 776.)[6] In Discussion Sections 3 and 4, which contain the appellate court's legal analysis regarding government speech, the court never even mentioned *Gerawan I* or *Gerawan II*. It relied entirely on the Ninth Circuit and that court's misconstruction of *Johanns*.

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[6] As discussed below, even that one line should have been enough for the appellate court to know that it could not decide this case, as it did, on the face of the statute, but needed to evaluate the facts about CDFA's actual practice—namely, whether the CDFA in fact supervised or controlled TGC's messages.

Following the reasoning of the Ninth Circuit, the Court of Appeal concluded that the "Commission's activities could be classified as government speech" under *Johanns* 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 court did not reach the question whether the Commission is a government entity because it held that the government effectively controlled the Commission's speech. (*Id.* at 780.) The court conceded that "[u]nlike the Beef Order [in *Johanns*], the Ketchum Act does not *require* any type of review by the Secretary over the actual messages promulgated by the Commission." (*Id.* at 779.) Notwithstanding this lack of oversight, which differentiated this case from *Johanns*, the court concluded that it was sufficient that CDFA selects members of the Commission, and in its own policy manual "retains the authority to review the Commission's advertising" in exceptional circumstances. (*Id.* at 773-74.) Acknowledging the CDFA had never in fact reviewed the advertising content of the Commission, the court concluded: "Even if the Secretary does not exercise this authority and intervene in message development, he or she does not relinquish the power to do so." (*Id.* at 779.)

Petitioners filed a Petition for Review before this Court, which granted the petition on July 22, 2015.

SUMMARY OF ARGUMENT

This Court and the U.S. Supreme Court have provided clear guidance about how to distinguish government speech from private speech in the context of agricultural promotion programs. (*Gerawan II*, 33 Cal.4th 1; *Johanns*, 544 U.S. 550.) Both agree that the government speech label, and the special exemption from constitutional supervision it affords, is warranted only where the democratic process provides an independent check on the content of that speech. (*See Walker v. Texas Division, Sons of Confederate Veterans, Inc.* (2015) 135 S. Ct. 2239, 2245) ("[I]t is the democratic electoral process that first and foremost provides a check on government speech.").) After all, "the reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people." (*Abood v. Detroit Bd. of Education* (1977) 431 U.S. 209, 259 n.13 (Powell, J., concurring).) As both courts also have held, this assurance of political accountability is present for a forced subsidy of commodity advertising *only* if the program's messaging content was *in fact* controlled by and decided upon by government officials. (*See infra* I.A.)

This Court's case law further suggests that a government speech defense is unavailing if the ads are not attributed to the government, and the viewer therefore does not associate the message with the government. (*See infra* I.B.)

The Court of Appeal thus erred by deferring to the Ninth Circuit's decision that CDFA's theoretical, but entirely unexercised, power to review the Commission's work made it government speech under the First Amendment. It is always problematic to defer to a lower federal court's interpretation of federal law on a question of state constitutional interpretation. That deference is all the more improper here because the Ninth Circuit's analysis is in plain conflict with this Court's *and* the U.S. Supreme Court's precedent. (*See infra* I.C.)

A straightforward application of controlling precedent compels the conclusion that the TGC's forced-subsidy advertising program must be reviewed under intermediate scrutiny to determine whether it violates the free speech clause of the California Constitution. (*See Gerawan II*, 33 Cal.4th at 6.) Here, it is undisputed that the Secretary of CDFA has performed virtually no supervision of the TGC in general, and exercised no oversight over its promotional campaigns in particular; moreover, the Commission's ads are publicly attributed to private industry and not to the government. The pursuit by industry members who serve on the TGC of their own private commercial interests, at the literal and figurative expense of plaintiffs, must therefore be scrutinized for the burdens it imposes on the free expression of the program's unwilling participants. (*See infra* II.)

An entity's power to coerce contributions to its speech is not immune from constitutional review merely because the entity was created by statute

and empowered by the government. 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 therefore not that of the California government. (*See infra* III.) The judgment of the Court of Appeal should therefore be reversed, and the case remanded for the Court of Appeal to consider plaintiffs' claim that the TGC's compelled subsidies cannot withstand constitutional review. (*See infra* IV.)

ARGUMENT

I. A COMMODITY ADVERTISING PROGRAM IS GOVERNMENT SPEECH ONLY IF THE CONTENT IS IN FACT CONTROLLED BY GOVERNMENT OFFICIALS AND ATTRIBUTED TO THE GOVERNMENT

A. For Commodity Advertising to Constitute Government Speech, the Case Law Requires that the CDFA In Fact Control the Promotional Content

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). Absent genuine control by politically accountable government officials over the promotional message, a government-empowered industry board cannot claim the talisman of government speech.

The *Gerawan* cases involved plum growers seeking to differentiate their products, who challenged a marketing order requiring them to finance generic advertising of plums. (*Gerawan II*, 33 Cal.4th 1.) This Court expressly declined to follow the U.S. Supreme Court's then-recent First Amendment decision in *Glickman v. Wileman Bros. & Elliott* (1997) 521 U.S. 457, which held that the First Amendment "does not protect commercial speech against compelled funding." (*Gerawan I*, 24 Cal.4th at 503.) In an opinion by Justice Stanley Mosk, this Court held that the plum marketing order was subject to challenge under the free speech clause of the California Constitution. (*Id.* at 509.)

The *Gerawan I* Court recognized that the free speech rights of growers are threatened where a commodity program forces them to fund "generic advertising about plums as a commodity—generic advertising that is intended not to prevent or correct any otherwise false or misleading message in the interest of consumer protection, but solely to develop markets and promote sales in the interest of producer welfare." (*Id.* at 510.) In particular, the Court cautioned that "[g]eneric advertising can be manipulated to serve the interests of some producers rather than others, as by allowing some to develop a kind of brand by means of funds assessed from all and then use it for their own exclusive benefit." (*Id.* at 504.) The Court noted that some producers "may find themselves disadvantaged by generic advertising in their competition against others." (*Ibid.*) And it accepted that a producer

may have genuine objections to coerced participation in generic advertising when "others ... hijack[] his own funds as they drive to their own destination." (*Ibid.*)

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 substantial alignment with this Court's interpretation of California law. (*United States v. United Foods* (2001) 533 U.S. 405.) Subsequently in *Gerawan II*, this Court clarified that the plum advertising program should be reviewed on remand under intermediate scrutiny. (*Gerawan II*, 33 Cal.4th at 6 (citing *Central Hudson Gas & Elec. v. Public Serv. Commission* (1980) 447 U.S. 557, which adopted intermediate scrutiny as the standard of review for restrictions on commercial speech).) The Court discussed favorably—several times and at length—the U.S. Supreme Court's decision in *United Foods*, which found the compulsory generic advertising program for mushrooms unconstitutional. (*See, e.g.*, *Gerawan II*, 33 Cal.4th at 16-20.)

But the Court also recognized an exception to this general principle: 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 26-27.) The Court remanded the case for

"further factfinding," in part because defendant's government speech defense could not be "resolved on the pleadings." (*Id.* at 28.)

In remanding the case, *Gerawan II* articulated the controlling standard for a government speech defense. The Secretary of CDFA argued 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 rejected that argument. It held that the Secretary's statutory obligation to sign off on the advertisements was not dispositive. Rather, the speech may "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.) In other words, an approval process is not enough; the generic advertising messages must "in fact" be "decided upon" by an accountable government official.

The case 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*," or "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).)