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.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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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CERTIFICATION OF INTERESTED ENTITIES OR PERSONS

S226538 - DELANO FARMS COMPANY v. CALIFORNIA TABLE GRAPE COMMISSION

Full Name of Interested Entity/Person	Party / Non-Party		Nature of Interest
California Table Grape Commission	[✓]	[ ]	
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Submitted by: Thomas G. Saunders

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STATEMENT OF ISSUES PRESENTED

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 its persuasive value.

As stated in the 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.

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 advertising of California table grapes 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. Both holdings are correct and independently warrant affirmance.

When this litigation began more than fifteen years ago, the law governing claims like Petitioners' was undeveloped. But in the intervening years—while these cases were largely stayed or dormant—the law has become clear. In 2005, the U.S. Supreme Court in *Johanns v. Livestock Marketing Association* (2005) 544 U.S. 550, rejected a First Amendment challenge to the federal beef promotion program, holding that the

program's speech was "government speech" that could be funded from mandatory assessments. In the ten years since *Johanns*, not a single commodity promotion program has been found unconstitutional under the Free Speech Clause of the U.S. or California Constitutions. Indeed, in 2009, the U.S. Court of Appeals for the Ninth Circuit applied *Johanns* to reject a federal First Amendment claim by Plaintiff Delano Farms against the Commission based on the same allegations at issue here. (*Delano Farms Co. v. California Table Grape Comm'n* (9th Cir. 2009) 586 F.3d 1219, 1220.) The Ninth Circuit held that the speech of the Commission is government speech immune from First Amendment challenge because (1) the Commission is itself a government entity, and (2) the message of the Commission is subject to the control of CDFA.

Petitioners by and large concede that *Johanns* defines the contours of the government speech doctrine under the State Constitution as well. Yet they take issue with the Ninth Circuit's straightforward application of *Johanns* to the Commission and ask this Court to take state law in a different direction. They do so on the theory that, in their view, government speech requires day-to-day micromanagement of the Commission's work by CDFA.

Petitioners' theory is doubly wrong. First, because the Commission is itself a government entity, oversight by *another government entity* is unnecessary. Moreover, even if the Commission were not a government

entity, Petitioners still ask the wrong question. Government accountability does not depend on whether a CDFA official attends a particular meeting. The relevant question is whether the State has the *legal authority* to control the Commission. It indisputably does. As the Court of Appeal and the Ninth Circuit correctly held, the Commission simply implements the State's generic-advertisement message—a message that the Legislature defined in extraordinary detail in the Ketchum Act. The Commission, moreover, carries out this statutory mandate through Commissioners who, among other safeguards, are each subject to a clear form of government accountability and control: CDFA's undisputed power of appointment and removal. The Court of Appeal's judgment on government speech should be affirmed.

Petitioners' arguments under intermediate scrutiny are even more insubstantial. While the Court of Appeal did not reach intermediate scrutiny, the parties briefed the issue at every stage of this litigation, and the Superior Court decided the question in detail. It correctly held that the Commission satisfies intermediate scrutiny. And no wonder: On summary judgment, the Commission "produced ample evidence of the effectiveness of" its work, whereas Petitioners "produce[d] no evidence contesting the evidence of the Commission's effectiveness." (CT-13:3168.) Although this case should begin and end with the holding that the Commission's speech is government speech, this Court is also perfectly positioned to

affirm the judgment on intermediate scrutiny based on the lopsided summary judgment record already reviewed by the Superior Court.

This litigation has been pending for fifteen years. It is time finally 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.

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.)[1]

[1] 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].)

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"; "instruct[ing] 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 §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 21% 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 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.[2] (CT-8:1734 [SF ¶75].) As a government agency, the Commission is also subject to numerous laws governing public entities, including the Bagley-Keene Open Meeting Act (Gov't Code §11121), the Public Records Act (*id.* §§6252(f), 6276.08), and the Political Reform Act of 1974 (*id.* §82049). (*See also* CT-8:1735-1736 [SF ¶85]; *infra* pp. 27-28.)

CDFA has broad authority to oversee the Commission's operations. The Secretary of CDFA appoints and can remove all board members of the Commission. (CT-8:1735 [SF ¶76].) 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].) Although Petitioners have filed grievances with CDFA challenging other Commission activities, Petitioners have never filed a grievance

[2] 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].)

challenging the Commission's advertising. (CT-2:357 [CTGC SSUMF ¶20]; CT-3:489-490 [Nave Decl. ¶¶19-21].) 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].) Even without a grievance, CDFA "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)].) The Commission is also subject to audit by CDFA and the Department of Finance. (CT-8:1736 [SF ¶89]; Food & Agric. Code §65572(f).)[3]

The Legislature established the Commission's promotion program to address a significant structural problem in the table grape industry. (CT-7:1365-1369 [Alston Decl. ¶¶11-22].) Advertising and other efforts to promote unbranded commodities—like table grapes—benefit the entire industry, yet growers who do not wish to fund them cannot be excluded from their benefits. (CT-7:1367 [Alston Decl. ¶¶16-17].) The table grape industry is "particularly susceptible" to this problem. (CT-7:1368-1369 [Alston Decl. ¶20].) "[B]rand names play virtually no role in shoppers'

[3] The Department of Finance conducted a fiscal and compliance audit in 2009 (CT-8:1736 [SF ¶89]); CDFA-approved independent auditors have subsequently conducted such audits pursuant to CDFA procedures (CT-3:488-489 [Nave Decl. ¶16]).

decisions about what fresh grapes to buy." (CT-4:880 [Jolly Decl. ¶8]; CT-8:1716 [SF ¶12] [stipulation that "Consumers do not shop for grapes with brand names in mind"].) Moreover, with approximately 475 growers and 100 shippers, the table grape industry "has one of the most fragmented structures of California fresh produce commodities." (CT-7:1368-1369 [Alston Decl. ¶20]; *see also* Food & Agric. Code §63901(c).)

These features of the industry make it economically irrational for individual growers and shippers to undertake meaningful consumer advertising—either branded or generic. (CT-7:1368-1369 [Alston Decl. ¶20].) The Commission's activities address this "inability of individual producers to maintain or expand present markets or to develop new or larger markets," which the Legislature found "results in an unreasonable and unnecessary economic waste" and threatens critical state interests. (Food & Agric. Code §65500(c); *see also id.* §65500(d)-(e).)

The Commission's efforts have been highly successful. Econometric analyses presented in the Superior Court—which included three different studies undertaken by the leading expert in the field using almost 40 years of data—demonstrated that the Commission's promotion activities have a substantial, positive, and statistically significant effect on demand. (CT-2:373-374 [CTGC SSUMF ¶¶124, 129]; CT-7:1370-1371, 1379 [Alston Decl. ¶¶24, 26-28, 47].) The enhanced demand generated by the Commission results in increased table grape revenues that far exceed the cost

of funding the Commission's activities and in significant net benefits to the State's economy as a whole. (*See* CT-2:375-376 [CTGC SSUMF ¶132, 139-141]; CT-7:1373-1375 [Alston Decl. ¶¶29-34].) The Commission's international trade and issue management activities have likewise helped open foreign markets, including India and China, to California table grapes and keep markets open. (CT-8:1729-1733 [SF ¶¶54-61].) And 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].)

In contrast, Petitioners' own stipulations establish that they conduct *no* consumer advertising. In the Superior Court, Petitioners stipulated that:

- "Plaintiffs conduct no advertising directed at consumers of table grapes";
- "Plaintiffs conduct no television, radio, online or newspaper advertising";
- "The only advertising conducted by each Plaintiff is the placement of a single print advertisement once a year in a single issue of a trade publication called The Packer or a trade publication called Produce News at a cost of less than $1,000 per year";
- "Plaintiffs' limited advertising in trade publications noted above is directed at the trade: retailers, food service providers, and/or wholesalers ..."; and
- "Other than the limited advertising in trade publications noted above, the only promotional or marketing activity undertaken by Plaintiffs is directly contacting their potential trade customers (retailers, foodservice providers, and/or wholesalers) and selling some of their grapes in packaging that identifies the name of the grower/shipper."

(CT-5:1106 [Stipulation at 2].)

B. PETITIONERS' 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." (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 federal 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 presented in their petition for review relate exclusively to Petitioners' free speech claims under Article I of the California Constitution. (Pet. 1; Pet. Reply 2 n.2.)

C. THE SUPERIOR COURT'S ORDER

In May 2013, Judge Black granted the Commission's motion for summary judgment. (CT-13:3127-3180.)[4] 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,

[4] Petitioners did not cross-move for summary judgment.

3168.) 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 to be narrowly tailored, concluding that 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-13:3168-3169.)[5]

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.)

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[5] Judge Black rejected petitioners' liberty, privacy, and due process claims. Judge Black also denied various motions to strike the 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 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. (*Delano Farms*, *supra*, 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.)

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.

SUMMARY OF THE ARGUMENT

Petitioners' free speech claims fail as a matter of law. The U.S. Supreme Court's decision in *Johanns v. Livestock Marketing Association* (2005) 544 U.S. 550, governs the analysis. Applying that decision, the Court of Appeal correctly held that the Commission's speech is government speech. That holding—which joins the unanimous consensus of every court and judge to have considered the issue under the U.S. or state constitution—should be affirmed for two independent reasons.

First, the Commission is itself a government entity. It was created by the California Legislature as a public corporation to further governmental objectives. Its board members are appointed by the Secretary of CDFA and subject to removal at her discretion. The Commission is subject to CDFA's extensive oversight authority, which includes the power to reverse the Commission's actions. It is expressly treated as a government entity under multiple provisions of the Government Code—including the Public Records Act and the Bagley-Keene Open Meeting Act—which guarantee the Commission's transparency and accountability. Indeed, California law vests the Commission with an array of quintessentially governmental powers, including the power to issue rules

and regulations, "investigate and prosecute civilly" violations of the Ketchum Act, and "file complaints with appropriate law enforcement agencies or officers for criminal violations." (Food & Agric. Code §65572(b), (g).) These provisions establish that, under any standard, the Commission is a government entity. For that reason, the Commission's speech is by definition government speech.

Petitioners' primary response to this straightforward argument is that the government speech doctrine always requires day-to-day and ad-by-ad micromanagement—even when, as here, the message is generated by a government-created entity that is controlled by politically accountable appointees and fulfills statutorily defined objectives through quintessentially governmental powers. Nothing in this Court's or the U.S. Supreme Court's jurisprudence countenances such an illogical result. The manner in which *another* governmental entity oversees the Commission's efforts is simply beside the point because the Commission is *itself* governmental.

Second, the Commission's speech is "effectively controlled" by the State. As the Court of Appeal and the Ninth Circuit both held, the Legislature itself defined the Commission's generic-promotion message with extraordinary precision. The Ketchum Act, moreover, provides CDFA with ample means to ensure that the Commission strictly adhere to that well-defined message. For example, unlike other California commissions

and federal programs, *every* member of the Commission is appointed, and removable, by a senior government official. Moreover, CDFA has the ability to correct or reverse actions of the Commission in grievance proceedings and to review the content of the Commission's advertising. The Commission is also subject to audit by the State. These safeguards are more than adequate to ensure that the Commission's message remains faithful to the generic-promotion mandate imposed by the Legislature—as has undisputedly been the case. Contrary to Petitioners' assertions, neither the Free Speech Clause nor *Gerawan II* nor *Johanns* mandates a particular bureaucratic structure or compels a government agency to engage in direct micromanagement of generic-advertising programs.

Petitioners' newly-minted contention that government speech requires "attribution" to the government fares no better. The U.S. Supreme Court expressly rejected an identical theory under the First Amendment in *Johanns*. The Court of Appeal has since done the same under the California Free Speech Clause in *Gallo Cattle Co. v. Kawamura* (2008) 159 Cal.App.4th 948. There is no merit to Petitioners' attempts to revive an "attribution" requirement based on dicta from *Gerawan II*, which, in fact, only described what "other courts" had erroneously done at the time.

Because the Commission's speech is government speech, the Court should affirm the Court of Appeal. In the alternative, Petitioners' claims also fail under intermediate scrutiny. As the Superior Court correctly