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Case No. S_____

IN THE SUPREME COURT OF CALIFORNIA

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

v.

CALIFORNIA TABLE GRAPE COMMISSION
Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL, FIFTH DISTRICT

Case No. F067956

PETITION FOR REVIEW

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STATEMENT OF ISSUES PRESENTED

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

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

WHY REVIEW SHOULD BE GRANTED

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

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

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

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

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

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

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

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

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

STATEMENT OF THE CASE

A. Petitioners and the Table Grape Commission

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

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

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

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

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

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

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

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

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

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

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

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

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

B. The Proceedings Below

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

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

LEGAL DISCUSSION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Teresinski (1982) 30 Cal.3d 822, 835-36 (internal quotation marks omitted).) Federal courts "must defer to the judgment of a state court on interpretations of state law," and not the reverse. (*Bui v. Alarcon* (9th Cir. 2000) 234 F.3d 1279.)

Even the Ninth Circuit recognizes that "because interpreting state law is not a core function of the federal courts we lack the expertise to interpret state laws." (*Sarausad v. Porter* (9th Cir. 2007) 503 F.3d 822, 825.) The duty of state courts to independently interpret state constitutional law in accordance with the precedents of this Court is especially clear with respect to Article I, because this Court has already clarified that the California State Constitution affords greater protection to free speech than the First Amendment does. *Gerawan I* emphasized that "article I's free speech clause and its right to freedom of speech are not only as broad and as great as the First Amendment's, they are even 'broader' and 'greater.'" (*Gerawan I*, 24 Cal.4th at 486.) And in *Gerawan II* this Court held that although the compelled subsidies at issue there did not violate the First Amendment under *Glickman*, they required further review on remand under Article I's free speech clause. (*Gerawan II*, 33 Cal.4th 1.)

In conflict with *Gerawan II*, the Ninth Circuit panel explicitly disregarded the "actual level of control evidenced in the record" that the Secretary of CDFA exercised over the Commission on the basis that "federal courts are ill-equipped to undertake" the task of "micro-managing

legislative and regulatory schemes." (*Delano Farms*, 586 F.3d at 1230.) That is at odds with *Garawan II*'s emphasis on "factual questions that may be determinative of the outcome," including "whether the Secretary's approval of the marketing board's message is in fact pro forma," and "whether the marketing board is in de facto control of the generic advertising program, and whether the speech is attributed to the government." (*Gerawan II*, 33 Cal.4th at 28.) This Court's review is therefore required. It is simply not sensible for a state court to defer to a federal court on an issue that the federal court declares itself ill-equipped to undertake.

C. The Court of Appeal's Holding is in Conflict with the U.S. Supreme Court's Decision in *Johanns*

Review by this Court is all the more essential because the Ninth Circuit opinion to which the Court of Appeal deferred is manifestly inconsistent even with federal law, as authoritatively interpreted by the U.S. Supreme Court in *Johanns*. *Johanns* carefully distinguished between the speech of a democratically-controlled body and speech by an industry group that has been delegated the power to coerce unwilling parties to pay for its messages, without genuine supervision or democratic accountability. *Johanns*' interpretation of the First Amendment is perfectly in line with this Court's analysis of state constitutional law in *Gerawan II* and only confirms that review should be granted, and the decision below reversed.

As the California Court of Appeal recognized in *Gallo Cattle*, "*Johanns* holds that where commodity advertising is authorized and the basic message is prescribed by statute *and where its content is overseen and subject to the control of a politically accountable official*, it is government speech." (*Gallo Cattle Co. v. Kawamura* (2008) 159 Cal.App.4th 948, 957. (emphasis added).) That is not the case here.

Johanns involved a First Amendment challenge by beef producers to the compelled subsidy of beef-related promotional campaigns imposed under a federal program by the Cattlemen's Beef Promotion and Research Board ("the Beef Board"). In deciding that the promotional messages of the Beef Board constituted the "Government's own speech," the Supreme Court considered whether "[t]he message of the promotional campaigns [was] effectively controlled by the Federal Government itself" and concluded that "[t]he message set out in the beef promotions [was] from beginning to end the message established by the Federal Government." (*Johanns*, 544 U.S. at 560-61.)

A number of features of the federal program at issue in *Johanns*, specifically the Secretary of Agriculture's comprehensive control over all stages of the advertising regime, established that the beef promotions were the government's message from "beginning to end." Under the governing statute, the Secretary of Agriculture appointed the members of the Beef Board and "imposed a $1-per-head assessment (or 'checkoff') on all sales

or importation of cattle and a comparable assessment on imported beef products." (*Id.* at 554 & 560 n.4.) With respect to the advertising content, the Secretary specified in general terms what the promotional message should be and "*exercise[d] final approval authority over every word used in every promotional campaign.*" (*Id.* at 561 (emphasis added).) The *Johanns* Court concluded that, "[w]hen, as here, the government sets the overall message to be communicated *and approves every word that is disseminated*, it is not precluded from relying on the government-speech doctrine." (*Id.* at 562 (emphasis added).)

Here, by contrast, control over the content of the advertisements resides with the members of the Table Grape Commission—eighteen grape growers and a "public member"—and not the Secretary of CDFA. (*Delano Farms*, 185 Cal.Rptr.3d at 773.) The Commission has discretion to decide (within a statutory cap) how much money to assess from the shipment of grapes, and it is "[i]n the discretion of the commission" to decide how to spend that money. (Cal. Food & Agric. Code § 65572(i).) The Commission also has the power "in the event of nonpayment of any assessment" to "bring an action in its name for collection of such assessment, civil penalties or for injunctive relief." (§ 65650.)

The Commission has decided to use part of the funds for promotional campaigns and it decides the content of those advertisements. Most importantly, whereas the Secretary of Agriculture exercised "final

approval authority over every word" in the Beef Board's promotional campaigns, (*Johanns*, 544 U.S. at 561), the Table Grape Commission runs its advertisements without the Secretary of CDFA's sign off. (Cal. Food & Agric. Code § 65572(h-k).) Nothing prevents the growers who control the Commission, who are by definition competitors of the petitioners, from crafting messages that advance their own private interests—such as by portraying California table grapes as essentially a generic commodity, at odds with petitioners' messaging which emphasizes differences in product quality and type—and forcing the entire industry to pay for them. (*See* 13 CT 3112:3-20; *United Foods*, 533 U.S. at 411 (unconstitutional for Mushroom Council to require "a discrete group of citizens[] to pay special subsidies for speech on the side that it favors").) As the Court of Appeal acknowledged, "[u]nlike the Beef Order, the Ketchum Act does not *require* any type of review by the Secretary over the actual messages promulgated by the Commission." (*Delano Farms*, 185 Cal.Rptr.3d at 779.)

Yet despite recognizing that "there were some important differences between the Ketchum Act and the program considered in *Johanns*," (*id.* at 779), the Court of Appeal inexplicably afforded these differences no legal significance. Instead, it deferred to the Ninth Circuit's conclusion that "these differences are legally insufficient to justify invalidating the Ketchum Act on First Amendment grounds." (*id.* at 780 (citing *Delano Farms*, 586 F.3d at 1230).) But the Ninth Circuit got it wrong. In *Johanns*,

it was dispositive that the "message set out in the beef promotions [was] from beginning to end the message established by the Federal Government." (*Johanns*, 544 U.S. at 560.) Not only did the Secretary of Agriculture select all members of the Beef Board, (*id.* at 560 n.4), and the statute set out in "general terms" what "the promotional campaigns shall contain," (*id.* at 561), but by statutory requirement the "Secretary or his designee ... approve[d] each project and, in the case of promotional materials, the content of each communication," (*id.* at 554).

The court below ignored these dispositive statutory differences, as well as the practical dissimilarities between the actual oversight exercised by the government in each case. It is clear, however, that the Court in *Johanns* was swayed not only by the Secretary of Agriculture's statutory obligation to review the Beef Board's work product, but also by the robust oversight the government in fact exercised over the Beef Board's promotional campaigns. The Court cited record evidence which "demonstrate[d] that the Secretary exercise[d] final approval authority *over every word used in every promotional campaign*," and it emphasized that the "proposed promotional messages [were] reviewed by Department officials *both for substance and for wording*, and some proposals [were] *rejected or rewritten by the Department.*" (*Johanns*, 544 U.S. at 561 (emphasis added).) What is more, in *Johanns* the Court stressed that "the Secretary's role [is not] limited to final approval or rejection" of the

advertisements; rather, "Officials of the Department also attend and participate in the open meetings at which proposals are developed." (*Johanns*, 544 U.S. at 561.)

As in *Gerawan II*, these measures of supervision and control were indispensable to the analysis in *Johanns*, not incidental. Absent such control, the Supreme Court reasoned, the political safeguards necessary to justify immunity from constitutional review would be lacking. As the Supreme Court explained, "cases have justified compelled funding of government speech by pointing out that government speech is subject to democratic accountability." (*Johanns*, 544 U.S. at 563.) In *Johanns*, the beef advertisements were "subject to political safeguards ... adequate to set them apart from private messages" only because the "Secretary of Agriculture, a politically accountable official, oversees the program, appoints and dismisses the key personnel, and retains absolute veto power over the advertisements' content, right down to the wording." (*Id.* at 563-64.)

Those political safeguards are missing here, where no politically accountable official has assumed responsibility, let alone any oversight, over the content of the Commission's speech. Indeed, the statutory scheme disclaims any liability on the part of the State of California for the acts of the commission or its contracts. (Cal. Food & Agric. Code § 65571.) And in this very case the Table Grape Commission is represented by private

counsel, in marked contrast to the Beef Board in *Johanns*, which was represented by the Department of Justice under the direction of the Secretary of Agriculture as client agency. (*See Johanns*, 544 U.S. 550.) Without political safeguards, the government cannot force a "discrete group of citizens" to fund the speech of private interests. (*United Foods*, 533 U.S. at 411.) In *United Foods*, it was the message "that mushrooms are worth consuming whether or not they are branded." (*Ibid.*) And here, the message is no different—the collective promotion of grapes as an undifferentiated commodity. (13 CT 3112:3-4.) As in *United Foods*, the producers' discomfort with that message warrants constitutional review. (*See* 533 U.S. at 410-11 ("First Amendment concerns apply here because of the requirement that producers subsidize speech with which they disagree.").)

The Court of Appeal also erred by agreeing with the Ninth Circuit that there are two "ways in which the Commission's activities could be classified as government speech, i.e., 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) (citing *Delano Farms*, 586 F.3d at 1223).) The court's acceptance of the proposition that the Commission's activities could be classified as government speech "if the Commission is itself a government entity" is inconsistent with *Gerawan II*, and finds no support in *Johanns*.

Gerawan II held that the speech of the Plum Board was not necessarily government speech simply by virtue of being the message propagated by a government-created entity pursuant to a government program. Indeed, had that sufficed, there would have been no need to remand the case for further factfinding. Instead, the Court agreed with the U.S. Supreme Court in *Keller*, that where a state-created entity is funded by a discrete professional circle and is not governed by state officials, but only by representatives of private interests *selected* by state officials, its speech will be deemed private unless there are additional measures of actual government control. (*See Gerawan II*, 33 Cal.4th at 28 ("In the present case, the marketing board is comprised of and funded by plum producers, and is in that respect similar to the State Bar" in *Keller*.).)

Similarly, *Johanns* did not distinguish *Keller* on the basis that the Beef Board was a government entity, while the State Bar was not. If that were enough, the First Amendment claim in *Johanns* would have been summarily dispatched. Indeed, *Johanns* recognized that the "entity to which assessments are remitted is the Beef Board, all of whose members are appointed by the Secretary pursuant to law," (*Johanns*, 544 U.S. at 560 n.4.), but that fact was relegated to a footnote and did not form the basis for the Court's conclusion that the "message of the promotional campaigns [was] effectively controlled by the Federal Government itself." (*Id.* at 560.) Government control was not illustrated by the formation of the Beef Board

under federal law, nor the appointment of its members by the Secretary of Agriculture, but by the Secretary's oversight and review of the Beef Board's messaging. And it was this fact—"[t]his degree of governmental control over the message funded by the checkoff"—that "distinguish[ed] [*Johanns*] from *Keller*," where the "state bar's communicative activities ... [were] not developed under official government supervision." (*Id.* at 561-62.) Together, *Gerawan II*, *Keller*, and *Johanns* teach us that resembling a "government agency" is not enough to claim the mantle of government speech. What matters are indicia of true political safeguards, including oversight and control by politically accountable officials. (*See id.* at 563.)

Johanns, like *Gerawan II*, turned not on corporate formality, but on whether the "promotional campaigns [were] effectively controlled by the Federal Government itself." (*Johanns*, 544 U.S. at 560-61.) That test furnishes a true measure of whether the commodity advertising is subject to sufficient democratic accountability to warrant the protections a "government speech" label affords. (*Cf. North Carolina State Bd. of Dental Examiners v. F.T.C.* (U.S. 2015) 135 S. Ct. 1101 (holding that North Carolina's state agency for regulating the practice of dentistry could invoke state-action antitrust immunity only if it is subject to "active supervision by the State.").) Especially when one considers the variety of corporations formed by the government, but free of substantial oversight by politically accountable officials, this limitation is vital. It would stretch the bounds of

common sense to conclude that the speech of government-formed corporations like Fannie Mae and Freddie Mac, the California State University, or the Medial Board of California is the speech of the government, or that the government could compel the funding of these corporations' speech exempt from constitutional limitations. No one mistakes such entities for a government mouthpiece nor presumes that their expression is "speech by the government itself concerning public affairs," rather than the speech of discrete or private interests. (*Gerawan I*, 24 Cal.4th at 503 n.8.) Approval of the corporation's message must be traceable to politically accountable officials for the logic of the government speech doctrine to hold.

Contrary to the Ninth Circuit's analysis in *Delano Farms*, the Supreme Court's decision in *Lebron v. Nat. R.R. Passenger Corp.* (1995) 513 U.S. 374, does not say otherwise. *Lebron* had nothing to do with the government speech doctrine. It held that Amtrak was a government entity "for purposes of determining the constitutional rights of citizens affected by its actions." (*Id.* at 392.) Whereas here the "government entity" label would shield the promotional campaigns of the Table Grape Commission from constitutional review, in *Lebron* it was the opposite: only if Amtrak was a government entity could it be sued by an individual who was prevented from displaying a political message on a train station billboard. The Court held that "[i]t surely cannot be that government, state or federal,

is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form." (*Id.* at 397.)

Confirming that *Lebron* is inapposite to the government speech doctrine, *Johanns* did not cite *Lebron* but instead reinforced *Keller*'s holding that the speech of a government-formed corporation is not exempt from First Amendment scrutiny if its message is "not developed under official government supervision." (*Johanns*, 544 U.S. at 561-62.) By ignoring that principle, the Court of Appeal departed from *Johanns*, *Keller*, and this Court's decision in *Gerawan II*, and reached an improper result on an important question of state constitutional law.

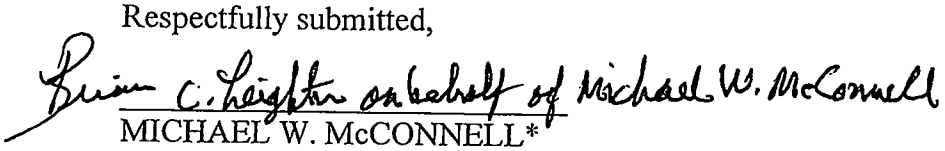
This Court should grant the petition for review to reaffirm the importance both of independent state court interpretation of questions of state constitutional law and of democratic accountability before industry groups may be empowered to compel unwilling parties to subsidize the dissemination of their commercial messages.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court grant this Petition for Review.

Dated: May 18, 2015

Respectfully submitted,



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CERTIFICATE OF WORD COUNT
PURSUANT TO RULE RULE 8.504(d)(1)

Pursuant to California Rule of Court 8.504(d)(1), counsel for Petitioners hereby certifies that the number of words contained in this Petition for Review, including footnotes but excluding the Table of Contents, Table of Authorities, and this Certificate, is 7,419 words as calculated using the word count feature of the computer program used to prepare the brief.

Dated: May 18, 2015

Respectfully submitted,

By: Suzanne Leggett on behalf of 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 May 18, 2015, I served a copy of the attached **PETITION FOR REVIEW** 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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Honorable Judge Donald S. Black
Fresno County Superior Court
1130 "O" Street
Fresno, CA 93721-2220
Superior Court Judge

Clerk of the Court
COURT OF APPEAL
FIFTH APPELLATE DISTRICT
2424 Ventura Street
Fresno, CA 93721
Appellate Court

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 18th day of May, 2015, 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

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

DELANO FARMS COMPANY et. al., Plaintiffs and Appellants, v. CALIFORNIA TABLE GRAPE COMMISSION, Defendant and Respondent.	F067956 (Super. Ct. Nos. 636636-3 (Lead), 642546, 01CECG01127, 01CECG02292, 01CECG02289 & 11CECG00178) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Donald S. Black, Judge.

Brian C. Leighton; Sagaser, Watkins & Wieland and Howard A. Sagaser for Plaintiffs and Appellants.

Baker, Manock & Jensen, Robert D. Wilkinson; Wilmer Cutler Pickering Hale and Dorr, Seth P. Waxman, Brian M. Boynton, Thomas G. Saunders and Francesco Valentini for Defendant and Respondent.

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Appellants, Delano Farms Company, Four Star Fruit, Inc., Gerawan Farming, Inc., Bidart Bros. and Blanc Vineyards, LLC, challenge the constitutionality of the statutory

EXHIBIT A

scheme that establishes respondent, the California Table Grape Commission (Commission), and requires table grape growers and packers to fund the Commission's promotional activities. Appellants assert that being compelled to fund the Commission's generic advertising violates their rights to free speech, free association, due process, liberty and privacy under the California Constitution.

The trial court granted summary judgment in the Commission's favor. The court held that the Commission is a "governmental entity" and thus its speech is government speech that can be funded with compelled assessments. Alternatively, the trial court applied the intermediate scrutiny test set forth in *Gerawan Farming, Inc. v. Kawamura* (2004) 33 Cal.4th 1, 22, and concluded that the compelled funding scheme did not violate the California Constitution.

Appellants contend the trial court erred in granting summary judgment. According to appellants, facts relied on by the Commission to demonstrate that the funding scheme passed constitutional muster under intermediate scrutiny were not proved by admissible evidence and are in dispute. Appellants further argue the court erred in finding the speech was government speech because the Commission did not demonstrate either that the Commission is a government entity or that the government controlled the Commission's activities and speech.

The Commission's promotional activities constitute government speech. Accordingly, we will affirm the trial court's grant of summary judgment on this ground.

BACKGROUND

1. *The Table Grape Commission.*

The Commission was created by legislation known as the Ketchum Act in 1967. (Food & Agr. Code,[1] § 65500 et seq.; *United Farm Workers of America v. Agricultural*

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[1] All further statutory references are to the Food and Agricultural Code unless otherwise noted.

Labor Relations Bd. (1995) 41 Cal.App.4th 303, 312.) The Legislature explained that "[g]rapes produced in California for fresh human consumption comprise one of the major agricultural crops of California, and the production and marketing of such grapes affects the economy, welfare, standard of living and health of a large number of citizens residing in this state." (§ 65500, subd. (a).) Noting that individual producers are unable to maintain or expand present markets or develop new markets resulting in "an unreasonable and unnecessary economic waste of the agricultural wealth of this state," the Ketchum Act declared it was the policy of the state to aid producers of California fresh grapes. (§ 65500, subds. (c) & (g).) To carry out this policy, the Commission supports the fresh grape industry through advertising, marketing, education, research, and government relations efforts. (§ 65572, subds. (h), (i) & (k).) The Commission's duties are set forth in the legislation.

The Commission's work is funded primarily by assessments imposed on all shipments of California table grapes as required by the Ketchum Act. The Commission determines the amount of the assessment based on what is reasonably necessary to pay its obligations and to carry out the objects and purposes of the Ketchum Act, not to exceed a statutory amount per pound. (§ 65600.) These assessments are paid by shippers who are authorized to collect the assessments from the growers. (§§ 65604, 65605.)

The Commission's governing board is composed of 18 growers representing California's six currently active table grape growing districts and one non-grower "public member." (§§ 65550, 65553, 65575.1.)

The California Department of Food and Agriculture (CDFA) and the Secretary of the CDFA (Secretary) retain authority over the Commission's activities through a few key functions. (*Delano Farms Co. v. California Table Grape Comm'n* (9th Cir. 2009) 586 F.3d 1219, 1221 (*Delano Farms*).) The CDFA oversees the nomination and selection of producers eligible to be appointed to the Commission board. (§§ 65559, 65559.5, 65560, 65562, 65563.) The Secretary not only appoints, but may also remove,

every member of the Commission. (§§ 65550, 65575.1; *Delano Farms, supra,* 586 F.3d at p. 1221.) Further, the Secretary has the power to reverse any Commission action upon an appeal by a person aggrieved by such action. (§ 65650.5.) Additionally, the Commission's books, records and accounts of all of its dealings are open to inspection and audit by the CDFA and the California Department of Finance. (§ 65572, subd. (f).)

The CDFA provides information and instructions to the Commission regarding marketing orders each month through the CDFA's "Marketing Memo." The CDFA also retains the authority to review the Commission's advertising. In its policy manual, the CDFA expressly "reserves the right to exercise exceptional review of advertising and promotion messages wherever it deems such review is warranted. This may include intervention in message development prior to placement of messages in a commercial medium or venue." (Cal. Department of Food and Agriculture, Policies for Marketing Programs (4th ed. 2006) p. C-3.)

Moreover, as with other state government entities, the Commission is subject to the transparency, auditing and ethics regulations designed to promote public accountability. (*Delano Farms, supra,* 586 F.3d at p. 1221.)

2. ***The underlying actions.***

Appellants object to being required to pay assessments to fund the Commission's activities. They seek a judgment "declaring that the statutes establishing the Commission and defining its alleged authority, are unconstitutional in that they violate [appellants'] rights guaranteed under the Free Speech and Free Association Clauses of the California Constitution." Appellants further allege that the law establishing the Commission exceeds the state's police power.

Appellants filed their original complaints between 1999 and 2001. These actions were stayed or dormant while the parties awaited decisions in a number of state and federal cases involving similar claims. The parties filed amended complaints in 2011 and the cases were consolidated.

The Commission moved for summary judgment. The Commission argued that appellants' free speech and association claims were barred because the Commission's speech activities constitute government speech. Alternatively, the Commission asserted appellants' free speech and association claims were barred because the Ketchum Act satisfies intermediate scrutiny. Finally, the Commission argued that appellants' police power claims failed under the rational basis standard of review.

The trial court granted summary judgment in the Commission's favor. The court concluded that the Commission is a government entity and thus the government speech defense was established. The court did not rule on the Commission's alternative claim that the Commission's speech is government speech because it is controlled by the CDFA. The court further found that the Ketchum Act survives both intermediate scrutiny and rational basis review.

DISCUSSION

1. *Standard of review.*

A party moving for summary judgment bears the burden of persuading the trial court that there is no triable issue of material fact and that it is entitled to judgment as a matter of law. (*Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 525 (*Brown*).) Once the moving party meets this initial burden, the burden shifts to the opposing party to establish, through competent and admissible evidence, that a triable issue of material fact still remains. If the moving party establishes the right to the entry of judgment as a matter of law, summary judgment will be granted. (*Ibid.*)

On appeal, the reviewing court must assume the role of the trial court and reassess the merits of the motion. (*Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1601.) The appellate court applies the same legal standard as the trial court to determine whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law. The court must determine whether the moving party's showing satisfies its burden of proof and justifies a judgment in the moving party's favor.

(*Brown, supra,* 171 Cal.App.4th at p. 526.) In doing so, the appellate court must view the evidence and the reasonable inferences therefrom in the light most favorable to the party opposing the summary judgment motion. (*Essex Ins. Co. v. Heck* (2010) 186 Cal.App.4th 1513, 1522.) If summary judgment is correct on any of the grounds asserted in the trial court, the appellate court must affirm, regardless of the trial court's stated reasons. (*Garrett v. Howmedica Osteonics Corp.* (2013) 214 Cal.App.4th 173, 181.)

2. ***The constitutional validity of generic advertising assessments.***

The United States Supreme Court provided the foundation for the law on the constitutional validity of compulsory fees used to fund speech in *Abood v. Detroit Board of Education* (1977) 431 U.S. 209 (*Abood*) and *Keller v. State Bar of California* (1990) 496 U.S. 1 (*Keller*). In *Abood* and *Keller*, the court "invalidated the use of the compulsory fees to fund union and bar speech, respectively, on political matters not germane to the regulatory interests that justified compelled membership." (*Gallo Cattle Co. v. Kawamura* (2008) 159 Cal.App.4th 948, 955-956 (*Gallo Cattle*).) Thereafter, both the United States Supreme Court and the California Supreme Court applied these precedents to generic commodity advertising funded by compulsory fees.

In *Glickman v. Wileman Brothers & Elliott, Inc.* (1997) 521 U.S. 457 (*Glickman*), the United States Supreme Court considered the compulsory subsidy of commodity advertising for the first time. The *Glickman* majority found that compulsory fees for generic advertising under a federal marketing order that regulated California grown nectarines, peaches, pears and plums did not violate the First Amendment. (*Glickman, supra,* 521 U.S. at pp. 472-473.) The majority noted that this generic advertising was unquestionably germane to the purposes of the marketing orders. Further, the assessments were not used to fund ideological activities. (*Id.* at p. 472.) The court reasoned that it was reviewing "a species of economic regulation that should enjoy the same strong presumption of validity" that is accorded "to other policy judgments made by Congress." (*Id.* at p. 477.)

When faced with a program very similar to the one at issue in *Glickman*, the California Supreme Court reached a different conclusion when it applied the California Constitution. (*Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468 (*Gerawan I*).) Noting that article I's free speech clause is broader and greater than the First Amendment, the *Gerawan I* court concluded that the California Plum Marketing Agreement's compelled funding of generic advertising implicated the plaintiff's right to freedom of speech under article I. (*Gerawan I, supra,* 24 Cal.4th at pp. 491, 517.) However, this holding did not conclude the case. "That the California Plum Marketing Program implicates Gerawan's right to freedom of speech under article I does not mean that it violates such right." (*Id.* at p. 517.) The court explained that there remained the questions of what test is appropriate for use in determining a violation and what precise protection does article I afford commercial speech. (*Ibid.*) Accordingly, the court remanded the matter to the Court of Appeal to address these questions. The court did not consider "[w]hether, and how, article I's free speech clause may accommodate government speech" because the issue was not timely raised. (*Id.* at p. 515, fn 13.)

The case returned to the California Supreme Court in *Gerawan Farming, Inc. v. Kawamura* (2004) 33 Cal.4th 1 (*Gerawan II*). However, in the interim, the United States Supreme Court decided *United States v. United Foods, Inc.* (2001) 533 U.S. 405 (*United Foods*).

In *United Foods*, the court considered the constitutional validity of a program that imposed mandatory assessments on handlers of fresh mushrooms. In practice, these assessments were spent almost exclusively on generic advertising to promote mushroom sales. The court concluded that compelled funding of commercial speech must pass First Amendment scrutiny. (*United Foods, supra,* 533 U.S. at p. 411.) Applying the rule in *Abood* and *Keller*, the court invalidated the mandatory assessments. Although *Abood* and *Keller* would permit the assessment if it were "germane to the larger regulatory purpose" (*id.* at p. 414) that justified the required association, the only regulatory purpose of the

mushroom program was funding the advertising scheme in question. (*Id.* at pp. 414-415.) The court distinguished *Glickman* on the ground that in *Glickman* the "compelled contributions for advertising were 'part of a far broader regulatory system that does not principally concern speech.'" (*Id.* at p. 415.) Although the government argued that the advertising was immune from scrutiny because it was government speech, the court declined to consider the claim because it was untimely. (*Id.* at pp. 416-417.)

In *Gerawan II* the California Supreme Court held that, under the California Constitution, compelled funding of generic advertising should be tested by the intermediate scrutiny standard articulated by the United States Supreme Court in *Central Hudson Gas & Elec. v. Public Serv. Comm'n* (1980) 447 U.S. 557. (*Gerawan II, supra,* 33 Cal.4th at p. 22.) The court noted that, despite the United States Supreme Court's holding in *Glickman*, *United Foods* seemed to be in agreement with *Gerawan I*. The *Gerawan II* court described *United Foods* as holding "that the compelled funding of commercial speech does not violate the First Amendment *if* it is part of a larger marketing program, such as was the case in *Glickman*, and *if* the speech is germane to the purpose of the program. But that being the case, compelled funding of commercial speech must be said to implicate the First Amendment, i.e., such compelled funding requires a particular constitutional inquiry along the lines of *Abood* and its progeny." (*Gerawan II, supra,* 33 Cal.4th at p. 17.) 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. (*Id.* at p. 28.)

3. ***Compelled generic advertising as government speech.***

In *Johanns v. Livestock Marketing Assn.* (2005) 544 U.S. 550 (*Johanns*), the United States Supreme Court directly addressed, for the first time, the government speech argument that had been raised in both *Glickman* and *United Foods*. The court described the dispositive question as "whether the generic advertising at issue is the Government's own speech and therefore is exempt from *First Amendment* scrutiny." (*Johanns, supra,*

544 U.S. at p. 553.) This case arose under the Beef Promotion and Research Act (Beef Act).

The *Johanns* majority delineated two categories of cases where First Amendment challenges to allegedly compelled expression have been sustained: "true 'compelled-speech' cases, in which an individual is obliged personally to express a message he disagrees with, imposed by the government; and 'compelled-subsidy' cases, in which an individual is required by the government to subsidize a message he disagrees with, expressed by a private entity." (*Johanns, supra,* 544 U.S. at p. 557.) The court then noted "We have not heretofore considered the *First Amendment* consequences of government-compelled subsidy of the government's own speech." (*Ibid.*) However, the court pointed out, "'[c]ompelled support of government' -- even those programs of government one does not approve -- is of course perfectly constitutional, as every taxpayer must attest." (*Id.* at p. 559.)

The Beef Act announced a federal policy of promoting the marketing and consumption of beef. The Beef Act directs the Secretary of Agriculture to implement this policy by issuing a Beef Promotion and Research Order (Beef Order) and by appointing a Cattlemen's Beef Promotion and Research Board (Beef Board). At issue in *Johanns* were beef promotional campaigns designed by the Operating Committee of the Beef Board. These campaigns were funded by mandatory assessments on beef producers. (*Johanns, supra,* 544 U.S. at p. 553.)

The *Johanns* majority held that the beef promotional campaigns were the government's own speech. In reaching this conclusion, the court determined that the promotional campaigns' message was effectively controlled by the federal government itself. (*Johanns, supra,* 544 U.S. at p. 560.) First, Congress directed the creation of the promotional program and specified that the program should include "'paid advertising, to advance the image and desirability of beef and beef products.'" (*Id.* at p. 561.) Second, "Congress and the Secretary have also specified, in general terms, what the promotional

campaigns shall contain ... and what they shall not." (*Ibid.*) "Thus, Congress and the Secretary have set out the overarching message and some of its elements, and they have left the development of the remaining details to an entity whose members are answerable to the Secretary ...." (*Ibid.*) Although the Secretary did not write the ad copy himself, the Secretary appointed half the members of the Operating Committee and all of the Operating Committee's members were subject to removal by the Secretary. (*Id.* at p. 560.) Additionally, all proposed promotional messages were reviewed by Department of Agriculture officials both for substance and for wording, and some proposals were rejected or rewritten by the Department. Finally, Department of Agriculture officials attended and participated in the open meetings at which proposals were developed. (*Id.* at p. 561.) Therefore, the court held, the Beef Board and the Operating Committee could rely on the government speech doctrine to preclude First Amendment scrutiny. (*Id.* at p. 562.) Finding that the promotional campaigns were effectively controlled by the government, the court declined to address whether the Operating Committee was a governmental or a nongovernmental entity. (*Id.* at p. 560, fn. 4.)

In *Gallo Cattle,* the Third District held that *Johanns* applies to the free speech clause under article I, section 2 of the California Constitution. (*Gallo Cattle, supra,* 159 Cal.App.4th at p. 955.) The *Gallo Cattle* court first noted that, in determining whether to follow the United States Supreme Court in matters concerning the free speech doctrine, the California Supreme Court has followed the reasoning set forth in *People v. Teresinski* (1982) 30 Cal.3d 822 (*Teresinski*). (*Gallo Cattle, supra,* 159 Cal.App.4th at p. 959.)

In *Teresinski,* the court explained that decisions of the United States Supreme Court "are entitled to respectful consideration [citations] and ought to be followed unless persuasive reasons are presented for taking a different course." (*Teresinski, supra,* 30 Cal.3d at p. 836.) These potentially persuasive reasons fall into four categories: (1) something in the language or history of the California provision suggests that the issue should be resolved differently than under the federal Constitution; (2) the high court

opinion limits rights established by earlier precedent in a manner inconsistent with the spirit of the earlier opinion; (3) there are vigorous dissenting opinions or incisive academic criticism of the high court opinion; and (4) following the federal rule would overturn established California doctrine affording greater rights. (*Id.* at pp. 836-837.)

Applying the four *Teresinski* categories, the *Gallo Cattle* court concluded that the United States Supreme Court's reasoning in *Johanns* should be followed in California. The court determined that the language and history of the California free speech provision do not compel a different resolution from that under the federal Constitution. (*Gallo Cattle, supra,* 159 Cal.App.4th at pp. 959-961.) Further, there is no prior California holding concerning the application of the government speech doctrine. (*Id.* at p. 961.) Finally, the court found the majority's reasoning in *Johanns* to be more persuasive than the dissent.

We agree with the *Gallo Cattle* court's analysis of this issue. Accordingly, we will apply *Johanns* here.

4. ***The Commission's speech is government speech.***

In *Delano Farms*, the Ninth Circuit analyzed the constitutional validity of the compelled funding of generic advertising levied through the Commission. The court considered both ways in which the Commission's activities could be classified as government speech, i.e., if the Commission is itself a government entity or if the Commission's message is effectively controlled by the state. The court concluded that the Commission's promotional activities constituted government speech under either avenue of classification and were therefore immune from a First Amendment challenge. (*Delano Farms, supra,* 586 F.3d at p. 1223.)

The *Delano Farms* court compared the framework of statutes governing the Commission to the scheme addressed in *Johanns.* (*Delano Farms, supra,* 586 F.3d at pp. 1227-1228.) The court first noted that the founding of the Commission, its structure, and its relationship to the State of California is strikingly similar to the beef program at issue

in *Johanns*. Like the beef program in *Johanns*, the Commission was established by a legislative act. (*Delano Farms, supra,* at p. 1228.) Also similar to the beef program, the Legislature provided an overriding directive for the sorts of messages the Commission should promote. (*Ibid.*) "[T]he Legislature intends that the commissions and councils operate primarily for the purpose of creating a more receptive environment for the commodity and for the individual efforts of those persons in the industry, and thereby compliment individual, targeted, and specific activities." (§ 63901, subd. (e).)

The *Delano Farms* court observed that the California Legislature's expectations for the Commission and its messaging were much more specific than the stated objectives of the Beef Act and Beef Order discussed in *Johanns*. (*Delano Farms, supra,* 586 F.3d at p. 1228.) The Legislature directed the Commission to focus on,

> "The promotion of the sale of fresh grapes for human consumption by means of advertising, dissemination of information on the manner and means of production, and the care and effort required in the production of such grapes, the methods and care required in preparing and transporting such grapes to market, and the handling of the same in consuming markets, research respecting the health, food and dietetic value of California fresh grapes and the production, handling, transportation and marketing thereof, the dissemination of information respecting the results of such research, instruction of the wholesale and retail trade with respect to handling thereof, and the education and instruction of the general public with reference to the various varieties of California fresh grapes for human consumption, the time to use and consume each variety and the uses to which each variety should be put, the dietetic and health value thereof...." (§ 65500, subd. (f).)

The court concluded that the Legislature's directive went much further in defining the Commission's message than the Beef Order's general directive that the beef promotional campaigns should discuss different types of beef and should refrain from using brand names. (*Delano Farms, supra,* 586 F.3d at p. 1228.)

The *Delano Farms* court further noted that, like the Operating Committee in *Johanns*, "the Commission is tasked with developing specific messaging campaigns."

(*Delano Farms, supra,* 586 F.3d at p. 1228.) Importantly, the Secretary of the CDFA has the power to appoint and remove every member of the Commission. In contrast, the U.S. Secretary of Agriculture only appoints half of the Beef Board Operating Committee members. (*Id.* at pp. 1228-1229.) Further, the state possesses additional oversight powers over the Commission. The Commission's books, records and accounts of all of its dealings are open to inspection and audit by the CDFA and the California Department of Finance.

The *Delano Farms* court acknowledged that there were some important differences between the Ketchum Act and the program considered in *Johanns*. Unlike the Beef Order, the Ketchum Act does not *require* any type of review by the Secretary over the actual messages promulgated by the Commission. The Beef Board and the Operating Committee submit all plans to the U.S. Secretary of Agriculture for final approval. (*Delano Farms, supra,* 586 F.3d at p. 1229.)

Nevertheless, although not required, the CDFA retains the authority to review the Commission's advertising. As discussed above, the CDFA reserves the right to exercise exceptional review of advertising and promotion messages wherever it deems such review is warranted. 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. (Cf. *Paramount Land Co., LP v. Cal. Pistachio Comm'n* (9th Cir. 2007) 491 F.3d 1003, 1011-1012.) Moreover, the Secretary has the power to reverse any Commission action upon an appeal by a person aggrieved by such action. (§ 65650.5.)

The *Delano Farms* court concluded that, while there are differences in the statutorily-prescribed oversight afforded to the government with respect to the Commission and the beef program, these differences are legally insufficient to justify invalidating the Ketchum Act on First Amendment grounds. (*Delano Farms, supra,* 586 F.3d at p. 1230.) In other words, under the *Johanns* analysis, the state exercises effective control over the Commission's activities such that "the Commission's message is 'from

beginning to end' that of the State. [Citations.]" (*Delano Farms, supra,* at pp. 1227-1228.)

While California courts are not bound by decisions of the lower federal courts, they are persuasive and entitled to great weight. (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 58.) We find *Delano Farms* persuasive and will follow it in this case. 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.

As discussed above, the *Johanns* reasoning applies to free speech issues arising under the California Constitution. Therefore, the Commission's promotional activities, being immune to challenge under the First Amendment pursuant to *Johanns*, are also immune to challenge under the California Constitution. Accordingly, the Commission is entitled to summary judgment on the ground that its message is effectively controlled by the state. In light of this conclusion, we need not decide whether the Commission is a government entity or whether the Ketchum Act survives intermediate scrutiny under *Gerawan II.*

5. ***Summary judgment was proper on appellants' liberty and due process claims.***

Appellants contend the trial court erred in granting summary judgment on their liberty and due process causes of action arising from their claim that the Ketchum Act exceeds the state's police power. According to appellants, intermediate scrutiny, not rational basis, was the proper standard of review. Appellants further assert that there are disputed issues of material fact regarding this issue.

"Whether a law is a constitutional exercise of the police power is a judicial question." (*Massingill v. Department of Food & Agriculture* (2002) 102 Cal.App.4th

498, 504 (*Massingill*).) A law is presumed to be a valid exercise of police power and may not be condemned as improper if any rational ground exists for its enactment. (*In re Petersen* (1958) 51 Cal.2d 177, 182.)

The party challenging the law has the burden of establishing that it does not reasonably relate to a legitimate government concern. (*Massingill, supra,* 102 Cal.App.4th at p. 504.) Therefore, to prevail, that party must demonstrate that the law is manifestly unreasonable, arbitrary or capricious, and has no real or substantial relation to the public health, safety, morals or general welfare. (*Ibid.*)

In enacting the Ketchum Act, the Legislature declared that "the production and marketing" of California table grapes was "affected with a public interest" and that the Ketchum Act was "enacted in the exercise of the police power of this state for the purpose of protecting the health, peace, safety and general welfare of the people of this state." (§ 65500, subd. (h).) The Legislature has found, and indeed it is beyond dispute, that agriculture is the state's most vital industry and is integral to its economy. (§ 63901; *Hess Collection Winery v. Agricultural Labor Relations Bd.* (2006) 140 Cal.App.4th 1584, 1603.)

An act promoting table grapes, one of the major crops produced in California, for the purpose of protecting and enhancing the reputation of California table grapes is reasonably related to the goal of protecting the state's general welfare. Appellants have not demonstrated otherwise. They have not shown that the Ketchum Act is unreasonable, arbitrary or capricious and does not reasonably relate to the legitimate government concern of promoting and protecting California agriculture. Rather, appellants incorrectly argue that this particular exercise of police power requires a more stringent review. Appellants also erroneously attempt to place the burden on the Commission to demonstrate that that the Ketchum Act remains a valid exercise of the state's police power.

Since appellants did not meet their burden, the trial court properly granted summary judgment on their police power violation claims.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondent.

LEVY, Acting P.J.

WE CONCUR

KANE, J.

PEÑA, J.