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 THE CALIFORNIA TABLE GRAPE COMMISSION'S ANSWER TO AMICUS CURIAE BRIEFS

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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INTRODUCTION

As explained in the California Table Grape Commission's Answer Brief, the constitutionality of the advertising program that the Legislature charged the Commission with carrying out readily follows from the principles articulated by the U.S. Supreme Court in *Johanns v. Livestock Marketing Association* (2005) 544 U.S. 550. Applying that decision, the Court of Appeal correctly held that the Commission's speech is government speech, and that Petitioners' free speech claim therefore fails as a matter of law. That holding should be affirmed for two independent reasons: (i) the Commission is itself a government entity, and (ii) the message of the Commission is "effectively controlled" by the State (*id.* at 560).

Numerous features of the Commission and its speech support these conclusions. The California Legislature created the Commission to further the governmental objective of promoting California table grapes, and defined by statute the Commission's generic-promotion message with precision. The Commission's board members are appointed and subject to removal by the Secretary of the California Department of Food and Agriculture ("CDFA"). The Commission is subject to CDFA's oversight authority, which includes the power to reverse the Commission's actions. And the Commission 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. Together, these and other characteristics establish that the Commission is a government entity, and that its speech is government speech. (Answer Br. 19-52; CDFA Br. 15-19.)

Amicus DKT Liberty Project ("DKT" or "Amicus DKT") contends that the Commission's advertisements cannot be government speech because viewers allegedly do not attribute them to the government. Not only is this argument waived, but *Johanns* rejected this attribution theory, and DKT offers no compelling reason for this Court to adopt a different rule under California law.

The arguments made by Amici The Cato Institute, Institute for Justice, and Reason Foundation ("Cato") fare no better. Cato's assertion that the government speech doctrine unduly restricts private speech rights ignores that the Commission's speech complements, rather than competes with, private speech. It also ignores the government speech doctrine's critical role in ensuring the government can perform core functions without constantly confronting a heckler's veto. Cato's claim that the Commission cannot be a government entity because it can be abolished by referendum was rejected by *Johanns*, which recognized that such a referendum mechanism is entirely consistent with government speech and, if anything, provides a political safeguard that actually reinforces the Commission's status as a government speaker. And Cato's reliance on cases precluding

the government from "taking sides" in elections is misplaced, not the least because it is stipulated that the Commission's speech is neither political nor ideological.

In sum, DKT and Cato offer no sound basis for rejecting the conclusion that the Commission's advertisements are government speech. The decision of the Court of Appeal should be affirmed.

ARGUMENT

I. GOVERNMENT SPEECH DOES NOT REQUIRE ATTRIBUTION

Echoing Petitioners, DKT argues that the Commission cannot invoke the government speech doctrine because its advertisements cannot "actually be attributed by a listener to the government." (DKT Br. 2; *see also* Petitioners' Br. 25-27, 35-37; Reply Br. 21-23.) As explained in the Commission's Answer Brief (at 48-49), this attribution argument is waived because Petitioners failed to raise it in the Court of Appeal. (*Gavaldon v. DaimlerChrsyler Corp.* (2004) 32 Cal.4th 1246, 1265 ["As a general rule, we address only issues that have been raised in the Court of Appeal."]; *Cedars-Sinai Med. Center v. Superior Court* (1998) 18 Cal.4th 1, 6; Cal. Sup. Ct. Rule 8.500(c)(1).) DKT makes no attempt to dispute this point or otherwise endorse Petitioners' claim that they preserved the argument by briefly mentioning attribution below. (Reply Br. 21.) Nor could it, since such fleeting and ambiguous references are insufficient to avoid waiver.

(*See Mansell v. Board of Admin. of Pub. Emps.' Ret. Sys.* (1994) 30 Cal.App.4th 539, 545-546.)

In any event, the attribution theory fails on the merits. Requiring attribution whenever the government speaks would severely interfere with legitimate government objectives. Consider, for example, a program that distributes grants for non-profits to run 15-second anti-smoking ads. An attribution requirement would force the organizations to waste valuable airtime informing viewers that the government paid for each ad—airtime that could instead be spent on the government's important public health message. Or consider a program that enlists former gang members to dissuade teenagers from joining a gang: an attribution requirement would compel the former gang members to begin each conversation by identifying themselves as agents of the State. "Were the Free Speech Clause interpreted" to require attribution in such programs "government would not work." (*Walker v. Texas Div., Sons of Confederate Veterans, Inc.* (2015) 135 S. Ct. 2239, 2246.)

It is thus unsurprising that both the U.S. Supreme Court and the lower California courts have squarely rebuffed Petitioners' and DKT's attribution theory. As DKT concedes (at 4), *Johanns* "rejected" any attribution requirement under federal law: "The dissent cites no prior practice, no precedent, and no authority for this highly refined elaboration [i.e., its suggested attribution requirement]—not even anyone who has ever

before thought of it." (*Johanns*, *supra*, 544 U.S. at 564 n.7.) The Third Appellate District likewise rejected the theory under the California Constitution in a decision that DKT never cites, *Gallo Cattle Co. v. Kawamura* (2008) 159 Cal.App.4th 948: "We find the reasoning of the *Johanns* majority more persuasive than Justice Souter's dissent. We do not agree that the posited threat of a greater likelihood of outrage and intemperate response [in assessment cases] warrants creation of a novel special disclosure requirement." (*Id.* at 963.)

None of DKT's arguments for deviating from *Johanns* and overruling *Gallo* is persuasive. *First*, like Petitioners, DKT claims that in *Walker*, *supra*, 135 S. Ct. 2239, and *Pleasant Grove City v. Summum* (2009) 555 U.S. 460, the Supreme Court "backtracked" from *Johanns*' holding that the government may speak without attribution. (DKT Br. 16; *see also* Petitioners' Br. 26-27, 37; Reply Br. 22-23.) But this argument misunderstands the role attribution played in those cases. Unlike *Johanns*, *Walker* and *Summum* involved suits seeking to compel the government to transmit a private party's message—by issuing a license plate with a Confederate flag in *Walker* and by erecting a religious monument in a public park in *Summum*. In that context, the risk was that the public would erroneously believe "the State has *endorsed* th[e] [private party's] message" (*Walker*, *supra*, 135 S. Ct. at 2249 [emphasis added]), frustrating the State's ability to "select the views that it wants to express" (*Summum*, *supra*, 555

U.S. at 468.) Far from silently overturning *Johanns* by requiring attribution of the government's message in the circumstances here, *Summum* and *Walker* reaffirmed *Johanns*' basic insights while seeking to avoid *mis*attribution of private messages to the government in the circumstances of those cases. (CDFA Br. 19.)

Second, DKT contends that in *Gerawan Farming, Inc. v. Kawamura* (2004) 33 Cal.4th 1 ("*Gerawan II*"), this Court deemed "the attributability of speech to the government" to be "a major factor in whether a targeted subsidy program produces government speech." (DKT Br. 15-16; *see also id.* at 21-22.) *Gerawan II*, however, never settled on a specific test for government speech under the California Constitution. (CDFA Br. 17-18.) The Court merely identified attribution as one among several "questions that *may* be" relevant on remand, and noted that "other courts"—i.e., *not* the U.S. Supreme Court and *not* this Court—"ha[d] found" that question "significant." (*Gerawan II*, *supra*, 33 Cal.4th at 28 [emphasis added]; *see also* CDFA Br. 18.) Tellingly, the single decision *Gerawan II* referenced on this point was later vacated by the U.S. Supreme Court in light of *Johanns*. (*Cochran v. Veneman* (3d Cir. 2004) 359 F.3d 263, 273, *judgment vacated sub nom. Lovell v. Cochran* (2005) 544 U.S. 1058.) It would make little sense to read *Gerawan II*'s tentative suggestions based on a now-superseded *federal* decision as definitively imposing an attribution requirement under California law.

Third, DKT contends that "democratic theory" requires attribution because without attribution it is "impossible" for citizens to hold government accountable for its speech. (DKT Br. 5, 11.) But DKT never explains why individual advertisements must be expressly attributed to the State for there to be political accountability. The Commission's status as a public entity created by the Legislature is no secret. (*E.g.*, *infra* p. 8.) Moreover, regardless of attribution, table grape advertisements, like the beef advertisements at issue in *Johanns*, "are subject to political safeguards more than adequate to set them apart from private messages." (*Johanns*, *supra*, 544 U.S. at 563; *see* Answer Br. 25-30, 36-40.) DKT seems to accept that government generally can be held democratically accountable without attribution, since it does not claim that disclosure is required for *all* government speech. If political safeguards work across the board without attribution, it is difficult to see why they would fail solely for the compelled subsidization of generic commodity advertising. (*See Gallo*, *supra*, 159 Cal.App.4th at 963.)

Finally, even if an attribution requirement existed, it would be satisfied here. DKT's contention that the Commission's advertisements are not sufficiently attributed to the State (DKT Br. 22) is simply wrong and entirely ignores the Commission's rebuttal of this contention (Answer Br. 51-52). Like Petitioners, who never relied on or developed any attribution theory below (Answer Br. 48-49), DKT points to no actual evidence that

the tagline "Grapes from California" is inconsistent with attribution to the State of California. To the contrary, like Petitioners, DKT concedes (at 23) that viewers of the Commission's ads are often directed to its website. That website clearly identifies the Commission as a government speaker:

> The California Table Grape Commission was established by an act of the state's legislature in 1967.... The commission's importance to the state and its mandate—to maintain and expand markets for fresh California grapes and to create new and larger intrastate, interstate, and foreign markets—was reaffirmed and its authorities broadened by the legislature in 1995, 1997 and again in 2001.

(Cal. Table Grape Comm'n, *About the California Table Grape Commission*, http://www.grapesfromcalifornia.com/aboutus.php (last visited Mar. 17, 2016).) DKT's argument (at 23) that the Commission has a ".com," rather than a "ca.gov" URL also fails, given the number of counties, cities, school districts, water districts, courts, police departments, and waste management commissions that would similarly run afoul of such a URL-based government speech test. (*See* Answer Br. 52 & n.17.)

II. CATO'S ATTEMPTS TO NARROW THE GOVERNMENT SPEECH DOCTRINE SHOULD BE REJECTED

Cato does not join DKT's argument regarding attribution. Instead, Cato offers three arguments of its own for narrowing the government speech doctrine. Those arguments should be rejected.

First, Cato attacks the government speech doctrine based on the erroneous premise that government speech necessarily crowds out private

speakers from the marketplace of ideas. (Cato Br. 4-8.) Allowing government to participate fully in public debates enriches and expands those debates, it does not contract them. "If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed." (*Keller v. State Bar of California* (1990) 496 U.S. 1, 12-13.)

Moreover, even if in other settings government speech might burden private speech, that is decidedly not true here. The undisputed evidence submitted below shows that the Commission's advertising and other activities have increased overall demand for California table grapes. (CT-2:374 [CTGC SSUMF ¶129]; CT-7-1371 [Alston Decl. ¶27] [Commission's promotion activities "have a substantial, positive, and statistically significant effect on demand"].) For example, thanks in no small part to the Commission's assessment-funded efforts, "40% [of California table grapes] are now exported," as Petitioners acknowledged in the Court of Appeal (Opening C.A. Br. 26). (*See also* CT-3:511-517 [Nave Decl. ¶¶102-116] [describing international market-access efforts]; CT-2:408-409 [Giumarra Decl. ¶¶6-8] [same].) The larger market for grapes creates more opportunities for individual growers to engage in their own

speech in an effort to expand their market share. The Commission's speech thus complements, rather than competes with, private speakers.

In its rush to criticize the government speech doctrine, Cato also ignores the critical function the doctrine serves. "[S]ome government programs involve, or entirely consist of, advocating a position." (*Johanns*, *supra*, 544 U.S. at 559.) To run "a successful recycling program," for example, city government must be free to "writ[e] householders asking them to recycle cans and bottles." (*Walker*, *supra*, 135 S. Ct. at 2246.) "Were the Free Speech Clause interpreted" to stop the government from speaking, "government would not work." (*Ibid*; *see also Johanns*, *supra*, 544 U.S. at 574 [Souter, J., dissenting] ["To govern, government has to say something, and a First Amendment heckler's veto of any forced contribution to raising the government's voice in the 'marketplace of ideas' would be out of the question."].)

Second, Cato contends that the Commission cannot be a government entity because it can be abolished by a vote of table grape growers. (Cato Br. 10-12.) As Cato acknowledges (at 10), Petitioners do not even make this argument, and for good reason. The Beef Order at issue in *Johanns* was subject to a similar referendum mechanism: "Congress ... required a referendum among producers before permanently implementing the checkoff, and allowed the Secretary to call another referendum upon demand of a 'representative group' comprising 10 percent of cattle

producers." (*Johanns*, *supra*, 544 U.S. at 563 n.6.) The Court in *Johanns* viewed the referendum not as a signal that the Beef Board's speech was not government speech, but rather as a "political safeguard[]" that reinforced its status as government speech. (*Id.* at 563 & n.6; *cf. Gerawan II*, 33 Cal.4th at 26 ["Such participation (by agricultural producers in a referendum) may be a legitimate means of furthering the government interest."].) The same is true here.

Finally, Cato attacks the very notion of government speech based on cases saying that the government should not "take sides" in elections. (Cato Br. 12-15) These cases have little relevance here, however, given the parties' stipulation that "[t]he Commission has not run political or ideological advertisements." (CT-8:1721 [SF ¶28]; *see also Glickman v. Wileman Bros. & Elliott, Inc.* (1997) 521 U.S. 457, 469-470 [the Ketchum Act does not "compel the [growers] to endorse or to finance any political or ideological views."].) Speech promoting the purchase of California table grapes plainly does not present the same constitutional concerns as a government agency campaigning for or against a ballot measure.

CONCLUSION

For the foregoing reasons and the reasons given in Respondent's Answer Brief and the CDFA's Amicus Brief, the judgment of the Court of Appeal should be affirmed.

DATED: March 18, 2016

Respectfully submitted,

By: 

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CERTIFICATE OF WORD COUNT

Pursuant to Rule of Court 8.520(c)(1), I hereby certify that, including footnotes, the foregoing brief contains 2,448 words. This word count excludes the exempted portions of the brief as provided in Rule of Court 8.520(c)(3). As permitted by Rule of Court 8.504(c)(1), the undersigned has relied on the word count feature of Microsoft Word 2010, the computer program used to prepare this brief, in preparing this certificate.

DATED: March 18, 2016 By: _____

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CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, COUNTY OF FRESNO

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Fresno, State of California. My business address is 5260 North Palm Avenue, Fourth Floor, Fresno, CA 93704.

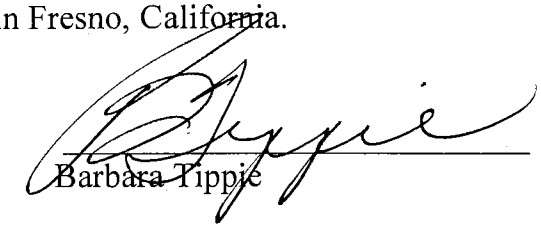
On March 18, 2016, I served true copies of the following documents described as **RESPONDENT THE CALIFORNIA TABLE GRAPE COMMISSION'S ANSWER TO AMICUS CURIAE BRIEFS** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am familiar with Baker Manock & Jensen's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 18, 2016, in Fresno, California.



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