Case No. S226538

IN THE SUPREME COURT OF CALIFORNIA

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

v.

CALIFORNIA TABLE GRAPE COMMISSION
Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL, FIFTH DISTRICT

Case No. F067956

SUPPLEMENTAL BRIEF OF PETITIONERS PURSUANT TO RULE 8.520(d)

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INTRODUCTION

Petitioners Delano Farms Company, Blanc Vineyards, LLC, Gerawan Farming, Inc., Four Star Fruit, Inc., and Bidart Brothers (together "Petitioners") respectfully submit this supplemental brief pursuant to rule 8.520(d)(1) of the California Rules of Court in order to address the impact of *Matal v. Tam*, No. 15-1293, 2017 WL 2621315 (U.S. June 19, 2017) on the issues presented for review in this case.

BACKGROUND

Matal v. Tam, No. 15-1293, 2017 WL 2621315 (U.S. June 19, 2017) dealt with a trademark applicant who petitioned the Court for review of a decision of the Patent and Trademark Office ("PTO") that denied the petitioner's application for a trademark pursuant to the "disparagement clause" of the Lanham Act. *See* 15 U.S.C. § 1052(a) (prohibiting the registration of trademarks that may "disparage ... or bring ... into contemp[t] or disrepute" any "persons, living or dead"). Specifically, petitioner was the lead singer of a rock group called "The Slants," and as all members of the group were Asian-American, they had chosen this moniker—a commonly known derogatory term meant to disparage Asian persons—to "reclaim" the term and "drain its denigrating force." (*Id.* at *1.) The PTO denied petitioner's application to trademark the term, however, on the grounds that the disparagement clause of the Lanham Act prohibited the requested trademark. (*Ibid.* (quoting 15 U.S.C. § 1052(a).)

While the Court did not find all of petitioner's arguments persuasive, it did hold that "[t]he disparagement clause violates the First Amendment's Free Speech Clause" and rejected the government's contention that trademarks could constitute government speech. *Id.* In so doing, the Court emphasized that it "exercises great caution in extending its government-speech precedents, for if private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints." (*Ibid.*)

DISCUSSION

While *Matal* dealt with several issues inapposite to the present action, the Court's discussion of what constitutes government versus private speech is highly instructive here. In particular, Petitioners discuss at length in their petition for review and subsequent briefing the import of *Johanns v. Livestock Marketing Association* (2005) 544 U.S. 550 and *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, (2015) 135 S. Ct. 2239 to the government speech doctrine at issue in the present matter. *Matal* further clarified both decisions in the course of explaining why the trademark process did not constitute government speech.

I. IN FINDING TRADEMARKS WERE PRIVATE—NOT GOVERNMENT—SPEECH, THE COURT EMPHASIZED THE LACK OF GOVERNMENTAL OVERSIGHT IN THE TRADEMARKING PROCESS.

As an initial matter, a key aspect of Petitioners' argument in this case is the lack of control and oversight actually exercised by the government in the messaging promulgated by the Table Grape Commission. (*See* Pet. Merits Br. at 17.) It is thus critical to recognize that in finding that trademarks do not constitute government speech, the *Matal* Court examined the trademarking process and emphasized the objectivity of that process and the lack of governmental oversight or involvement:

- The government "does not dream up" proposed trademarks and "does not edit marks submitted for registration";
- "[A]n examiner may not reject a mark based on the viewpoint that it appears to express";
- "[A]n examiner does not inquire whether any viewpoint conveyed by a mark is consistent with Government policy or whether any such viewpoint is consistent with that expressed by other marks already on the principal register";
- "[I]f the mark meets the Lanham Act's viewpoint-neutral requirements, registration is mandatory";
- "[I]f an examiner finds that a mark is eligible for placement on the principal register, that decision is not reviewed by any higher official unless the registration is challenged"; and
- "[O]nce a mark is registered, the PTO is not authorized to remove it from the register unless a party moves for cancellation, the registration expires, or the Federal Trade Commission initiates proceedings based on certain grounds."

(*Matal*, 2017 WL 2621315, at *12.) As such, it is the ***lack*** of governmental control and oversight that characterizes the "speech" inherent to a trademark as being private and not established by the federal government. *See id.* (noting that "[i]n light of all this, it is far-fetched to suggest that the content of a registered mark is government speech").

Petitioners similarly argue that the advertising messages promulgated by the Table Grape Commission constitute private speech because the applicable statutory framework does not ***require*** the government to exercise actual oversight of the messaging, and the government does not exercise any actual oversight ***in practice***, even if it is technically authorized to do so. (*See e.g.*, Pet. Merits Br. at 17, 25, 31.) The structure of the process for promulgating messages on behalf of table grape producers in California thus bears one of the hallmarks of private speech recognized by the *Matal* Court.

II. *MATAL* CONFIRMS *JOHANN'S* DIRECTIVE THAT ADVERTISEMENT MESSAGES MUST BE "ESTABLISHED" "FROM BEGINNING TO END" BY THE GOVERNMENT TO CONSTITUTE GOVERNMENT SPEECH

While *Matal* acknowledged that "[t]he Free Speech Clause ... does not regulate government speech" and explained the necessity of the government-speech doctrine in certain instances, *see Matal*, 2017 WL 2621315 at *11 (quoting *Pleasant Grove City v. Summum*, (2009) 555 U.S. 460, 467) (internal quotation marks omitted), it emphasized that the Court

"must exercise great caution before extending our government-speech precedents," because the government-speech doctrine "is susceptible to ***dangerous misuse***." (*Matal*, 2017 WL 2621315, at *12 (emphasis added).) If, for instance, "private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints." (*Ibid.*)

In concluding that "[n]one of [its] government speech cases even remotely supports the idea that registered trademarks are government speech," the *Matal* Court analyzed one of the decisions most critical to this case: *Johanns v. Livestock Marketing Association* (2005) 544 U.S. 550. In doing so, the Court emphasized the government's actual and extensive involvement with the ads crafted by the beef board. (*See Matal*, 2017 WL 2621315, at *13.) There, Congress and the Secretary of Agriculture "***provided guidelines*** for the content of the ads, Department of Agriculture officials ***attended the meetings*** at which the content of specific ads was discussed, and the Secretary could ***edit or reject*** any proposed ad." *Id.* (emphasis added). The Court noted that the ads were ultimately considered government speech ***specifically because*** the content and messaging of the ads was "established" by the government "***from beginning to end***." (*Ibid.* (quoting *Johanns,* 544 U.S. at 560) (emphasis added).) The government's participation in the creation of the ads at issue in *Johanns* thus bore "no

resemblance to anything that occurs when a trademark is registered." (*Ibid.*)

III. *MATAL* NOTES THAT *WALKER* "MARKS THE OUTER BOUNDS OF THE GOVERNMENT-SPEECH DOCTRINE," AND THE GOVERNMENT THERE "MAINTAIN[ED] DIRECT CONTROL OVER THE MESSAGES CONVEYED"

Alongside *Johanns*, the Court analyzed another seminal government speech cased that Petitioners and Respondents both discuss in their briefing here: *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, (2015) 135 S. Ct. 2239. The Court noted that *Walker*'s holding that messages promoted by Texas specialty license plates constitute government speech "marks the outer bounds of the government-speech doctrine." (*Matal*, 2017 WL 2621315, at *14.) Among other factors, the Court emphasized that the messaging on license plates was "'often closely identified in the public mind' with the State, since they are ***manufactured and owned*** by the State, generally ***designed by*** the State, and serve as a form of '***government ID***.'" (*Ibid.* (quoting *Walker*, 135 S.Ct. at 2249) (emphasis added).) Most critically, Texas "***maintain[ed] direct control over*** the messages conveyed on its specialty plates." (*Ibid.* (emphasis added).)

Matal thus reiterated *Walker*'s and *Johanns*'s clear conclusions that actual government involvement and control over the messaging is necessary for the government-speech doctrine to apply. This is precisely what Petitioners argue here: because neither the Secretary of Agriculture

nor any other democratically-accountable government entity exercised actual oversight or control over the messaging of the Table Grape Commission's ads, the speech contained within them cannot be considered government speech and is not immune from the strictures of the Free Speech Clause of the California Constitution. (*See* Pet. Merits Br. at 41-42.) Further, Respondents' contentions that the Table Grape Commission's ads are sufficiently attributed to the state of California[1]—*see* Resp. Ans. Br. at 51-52—is of no consequence: "simply affixing a government seal of approval" does not government speech make. (*Matal*, 2017 WL 2621315, at *12.)

CONCLUSION

In light of the Supreme Court's recent *Matal* decision and the ways in which it bolsters Petitioners' arguments regarding the government speech doctrine, Petitioners respectfully reiterate their request that the Court reverse the judgment of the Court of Appeal and remand this case for further proceedings.

[1] Petitioners disagree that the Commission's ads are attributed to either the State or the Table Grape Commission, as they made clear in their briefing on the merits. *See* Pet. Reply Br. at 23 (citing 8 CT 1743:25-1744:2; 9 CT 2045:6-2046:7; 2 CT 448-467); Pet. Merits Br. at 36.

Dated: June 27, 2017

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 1,542 words as calculated using the word count feature of the computer program used to prepare the brief.

Dated: June 29, 2017

Respectfully submitted,

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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 June 27, 2017, I served a copy of the attached **SUPPLEMENTAL BRIEF OF PETITIONERS PURSUANT TO RULE 8.520(d)** 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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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 27th day of June, 2017, 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.

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